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Vol. I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 183

THOMAS J. PENDERGAST, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

No. 186

ROBERT EMMET O'MALLEY, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

No. 187

A. L. McCORMACK, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONS FOR CERTIORARI FILED {JUNE 27, 1942. JUNE 29, 1942.

CERTIORARI GRANTED OCTOBER 12, 1942.

VOL. I

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Nos. 12067 and 12116.

CRIMINAL.

ROBERT EMMETT O'MALLEY, APPELLANT,

VS.

UNITED STATES OF AMERICA, APPELLEE.

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APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED AUGUST 30, 1941.

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the May Term, 1942, of said Court, before the Honorable Archibald K. Gardner, the Honorable Seth Thomas and the Honorable Walter G. Riddick, Circuit Judges.

Attest:

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Seal)

Be It Remembered that heretofore, to-wit: on the thirtieth day of August, A. D. 1941, a transcript of record pursuant to appeals from judgments and sentences entered by the District Court of the United States for the Western District of Missouri, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in certain causes wherein Robert Emmett O'Malley was Appellant, and the United States of America was Appellee. Nos. 12,067 and 12,116, wherein Thomas J. Pendergast was Appellant, and the United States of America was Appellee, Nos. 12,075 and 12,117, and wherein A. L. McCormack was Appellant, and the United States of America was Appellee, Nos. 12,087 and 12,118, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

[fol. 1] United States of America, Sct:

Be it remembered that heretofore, to-wit, at the regular March term of the United States District Court for the Central Division of the Western District of Missouri, and on the 13th day of July, 1940, there was filed in the office of the clerk, and entered upon the Criminal Docket as cause number 5040, which said number was a regular number in the Criminal Docket of the United States District Court for the Central Division of the Western District of Missouri, an Information in the cause wherein the United States of America is Plaintiff and Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack are Defendants.

Said Information is as follows:

[fol. 2] (Information.)

In the District Court of the United States of America for the Western District of Missouri Central Division United States of America, Plaintiff, -vs- Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack, Defendants. Before Judges Kimbrough Stone Albert L. Reeves Merrill E. Otis a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

Richard K. Phelps, Acting United States Attorney for the Western District of Missouri, at the direction of this Honorable Court and upon his official oath, hereunto appended, and upon his best knowledge and belief informs the Court as follows:

1. On the 25th day of May 1930, there was filed in the Central Division of the United States District Court for the Western District of Missouri a bill in equity by and on behalf of the American Insurance Company, a corporation, against Joseph B. Thompson, Superintendent of Insurance for the State of Missouri, and Stratton Shartel, Attorney General for the State of Missouri, bearing docket No. 270, in which, among other things, it was alleged that the defendant, Joseph B. Thompson, Superintendent of Insurance for the State of Missouri, had failed and neglected to approve the rates of insurance being charged by the plaintiff for fire and windstorm insurance according to a notice filed with the said State Superintendent of Insurance on

the 30th day of December, 1929, and that, although the said State Superintendent of Insurance refused to make any order approving said rates so charged by the plaintiff according to the notice filed the 30th day of December, 1929, the defendant, the said Superintendent of Insurance, asserted a lack of power in the plaintiff, American Insurance Company, to collect such rates without the approval of the Superintendent of Insurance; that this attitude on the part of the State Superintendent of Insurance was designed to lessen and destroy the value of the plaintiff's established business in the State of Missouri; that under the authority of certain designated statutes of the State of Missouri, the State Superintendent of Insurance would take action against the plaintiff insurance company, which would operate to deprive the plaintiff of its property and liberty of contract without due process of law, and would deny to [fol. 3] plaintiff the equal protection of the laws in derogation of Section 1 of the Fourteenth Amendment of the Constitution of the United States; that the plaintiff had no plain, adequate or complete remedy at law and that no relief could be afforded to it except in a United States Court of Equity; and praying that the said defendants and each of them be restrained and enjoined from invoking the powers conferred upon them by the said Sections of the Missouri state law above mentioned, and that they be restrained and enjoined from any interference of any kind with the said plaintiff in demanding, collecting, receiving and retaining premium charges upon fire insurance and windstorm insurance at the rates created and made by the aforesaid filing of December 30, 1929, and from refusing to renew the license of the plaintiff or any of its agents or representatives, or withhold such licenses.

2. That thereafter, to-wit, on the 2d day of July, 1930, the District Court of the United States for the Western District of Missouri, made up of the Honorable Kimbrough Stone, Circuit Judge, and Honorable Albert L. Reeves and Merrill E. Otis, District Judges, promulgated an order and filed the same enjoining and restraining the defendants and each of them, their attorneys, solicitors, deputies and agents, and all persons claiming or assuming to act for or under them, as prayed in the plaintiff's bill of equity hereinbefore mentioned.

3. That contemporaneously with the filing of the bill of equity aforesaid by the plaintiff, American Insurance Company, there were filed in said court similar bills of equity on behalf of other insurance companies praying for restraining orders and interlocutory injunctions against the defendant for the same reasons as stated in the aforesaid bill No. 270, the said additional bills of equity so filed bearing consecutive docket numbers from 271 to 426, both inclusive.

4. That the same restraining order and order for interlocutory injunction were promulgated and filed by the United States District Court in each of said causes numbered consecutively from 271 to 426, both inclusive, as in the case of American Insurance Company, plaintiff, against Joseph B. Thompson, Superintendent of Insurance for the State of Missouri, and Stratton Shartel, Attorney General for the State of Missouri, No. 270.

5. That at or about the same time the restraining orders and temporary injunctions were filed in the United States District Court as aforesaid in all of the cases aforesaid, an order was promulgated by said District Court providing for the appointment of a custodian to receive 16-2/3 per cent of all premium charges on [fol. 4] fire insurance and windstorm insurance collected by the said plaintiffs, which, under the orders of the court filed in said causes, was to be impounded pending the final decisions of the court in said causes upon the merits.

6. That thereafter the said District Court for the Western District of Missouri made an order appointing a Special Master to take testimony and to make a report to the court of his findings and conclusions.

7. That said restraining orders and interlocutory injunctions and said order impounding 16-2/3 per cent of the premium rates collected as aforesaid continued in full force and effect until the 1st of February, 1936.

8. That on the 18th of June 1935, in the United States District Court for the Western District of Missouri, a Motion for Decree was filed on behalf of the plaintiff insurance company in each of the cases described above in which plaintiff stated to the Court that a compromise and a settlement upon [al] matters in controversy between the various plaintiff insurance

companies and the state superintendent of insurance, had been reached, and in which said Motion for Decree the plaintiff prayed for an order of the Court to return to the policy holders and to the insurance companies the monies impounded by order of the Court in accordance with the stipulation made and entered into between the attorneys for the plaintiff and the attorneys for the defendant, which said stipulation was filed of record in the United States District Court for the Western District of Missouri on the 19th day of June 1935.

9. That the said stipulation filed in the United States District Court for the Western District of Missouri on the 19th of June 1935, compromised and settled all the issues in controversy between the plaintiff fire insurance companies and the State Superintendent of Insurance and the Attorney General for the State of Missouri, in said causes docketed in said court and having consecutive docket numbers from 270 to 426, inclusive, subject to the approval of the Court.

10. That on or about the 1st day of February 1936, the Court made a decree and filed the same as prayed for in the plaintiff's motion for decree filed on the 18th of June, 1935, directing the distribution of the impounded funds amounting approximately to $8,000,000.00, in accordance with the stipulation made and entered into between the attorneys for the fire insurance companies and the attorneys for the defendant, State Superintendent of Insurance, but retaining jurisdiction to [fol. 5] make orders respecting the obligation of the parties for payment thereof and to make further orders in aid of distribution of impounded monies, and retaining jurisdiction over all persons or parties affected by its decree for all purposes of effectuating said decree.

The said Richard K. Phelps, Acting United States Attorney, as aforesaid, further informs the Court that said stipulation for a compromise and settlement of the issues between the parties and for the distribution of the impounded funds was fraudulent, corrupt and unlawful, and that the decree of the Court filed on or about the 1st day of February 1936, in which an order was made for the distribution of the impounded funds in accordance with said stipulation, was wrongfully, fraudulently, corruptly, unlawfully and in contempt of the Court induced and procured in that:

(1) In the early part of the year 1935 the defendant A. L. McCormack, in the City of St. Louis, Missouri, had a conference with defendant R. E. O'Malley, who in 1935 was the duly appointed, qualified and acting Superintendent of Insurance for the State of Missouri, and was successor defendant to Joseph B. Thompson, in all of the suits in equity heretofore described having consecutive docket numbers from 270 to 426, inclusive, in which conference the said R. E. O'Malley asked the defendant, A. L. McCormack to go to Chicago to interview Charles R. Street, Chairman of the committee of fire insurance companies, for the purpose of determining if the said Charles R. Street would be willing to discuss the matter of a settlement and compromise of all the suits in equity heretofore described, and consecutively numbered on the docket of said United States District Court from 270 to 426, inclusive, with the defendant T. J. Pendergast; that within a few days thereafter the defendant A. L. McCormack went to Chicago, interviewed the said Charles R. Street at his office in the Strauss Building on Michigan Boulevard in the said City of Chicago, and was advised by the said Charles R. Street that he would meet the said T. J. Pendergast to discuss with him the matter of a settlement and compromise of the fire insurance rate litigation and the distribution of impounded funds.

(2) That shortly thereafter the defendant A. L. McCormack told the defendant R. E. O'Malley that the said Charles R. Street would meet the defendant, T. J. Pendergast, in Chicago for the purpose of attempting to effect a compromise and settlement of the litigation pending as aforesaid.

(3) Within a week or two thereafter the defendants, T. J. Pendergast and A. L. McCormack met the said Charles R. Street at the Palmer House, a hotel in the City of Chicago, and that at that meeting and conference [fol. 6] the said Charles R. Street told the said T. J. Pendergast that he would be willing to pay a fee in order to get the matters, then in controversy between the fire insurance companies and the State Superintendent of Insurance pending for a hearing upon the merits before the United States District Court, as aforesaid, compromised and settled, and that it was then and there agreed the defendant T. J. Pendergast was to

receive a fee of $500,000 if he could get the cases compromised and settled.

(4) That a few weeks thereafter the defendant A. L. McCormack delivered $50,000 in United States currency to T. J. Pendergast at the office of the said T. J. Pendergast at 1908 Main Street in Kansas City, Missouri, the said $50,000 representing the first installment to be paid upon the fee to be paid by Charles R. Street to T. J. Pendergast, and that the said T. J. Pendergast received and retained the said $50,000.

(5) That sometime after the transaction set forth in paragraph (4) next above, the exact day and date being unknown to the said Acting United States Attorney, the defendant A. L. McCormack received $50,000 in United States currency from Charles R. Street in Chicago, Illinois, and delivered the same to the defendant T. J. Pendergast at his office at 1908 Main Street, Kansas City, Missouri; that the said T. J. Pendergast received the said $50,000, retained $5,000 thereof, returning to the defendant A. L. McCormack the sum of $45,000, and that the defendant A. L. McCormack delivered $22,500 of this to the defendant R. E. O'Malley and retained $22,500 for himself.

(6) That sometime thereafter, the exact day and date being unknown to the said Acting United States Attorney, but being in the year 1935, a conference was held at the Muehlebach Hotel in Kansas City, Missouri, which was attended by Charles R. Street and various attorneys for the insurance companies, and R. E. O'Malley, the State Superintendent of Insurance, and divers other persons, at which a compromise and settlement of the fire insurance rate litigation and the distribution of the moneys impounded by order of this Court was agreed upon, which said agreement was substantially in all particulars the same as is recited in the stipulation hereinbefore referred to and filed with the United States District Court on the 19th of June, 1935.

(7) That sometime in the early part of the year 1936, the defendant A. L. McCormack received from Charles R. Street in Chicago, Illinois, the sum of $330,-
[fol. 7] 000 in United States currency, which he delivered to the defendant T. J. Pendergast at his office at 1908 Main Street in Kansas City, Missouri; that the

said T. J. Pendergast retained $250,000 of the said sum of $330,000 and returned to the defendant A. L. McCormack the sum of $80,000, saying, "Here is $80,000, give ha of it to Emmett" (meaning the defendant R. E. O'M ley), and that the said defendant A. L. McCormack delivered $40,000 to the defendant R. E. O'Malley in St. Louis, Missouri, and retained $40,000 for himself.

(8) That thereafter on or about the 25th day of October 1936, Charles R. Street transmitted by bank draft from Chicago, Illinois, to the defendant A. L. McCormack at St. Louis, Missouri, $10,000, which the said defendant A. L. McCormack converted into United States currency and conveyed to Kansas City and delivered to T. J. Pendergast at the Menorah Hospital in Kansas City, Missouri.

The said Richard K. Phelps, Acting United States Attorney, as aforesaid, further informs the Court that the payments of the money hereinbefore set forth paid by the said Charles R. Street to the said T. J. Pendergast and delivered by the said A. L. McCormack were for the purpose of buying the political influence of the said T. J. Pendergast, bribing and corrupting the said R. E. O'Malley, Superintendent of Insurance for the State of Missouri, as aforesaid, to induce the said R. E. O'Malley to accept, agree to and encourage the settlement and compromise of the litigation hereinbefore described, and to recompense the said A. L. McCormack for his part as intermediary between the said Charles R. Street, the said T. J. Pendergast and the said R. E. O'Malley, and for the purpose of obtaining from the United States Court a decree by the fraudulent means aforesaid, and to induce each and all of them to conceal from the United States District Court the fraudulent and corrupt transactions which have hereinbefore been set forth.

At all times hereinbefore mentioned the defendants and each of them agreed with and between each other that they would keep all of the transactions hereinbefore enumerated between Charles R. Street, T. J. Pendergast, R. E. O'Malley and A. L. McCormack unknown to and concealed from this Honorable Court, and that by affirmative acts of concealment and silence they would prevent the Court from having any knowledge or any information whatever concerning the fraudulent and corrupt

transactions between Charles R. Street and the defendants T. J. Pendergast, R. E. O'Malley and A. L. McCormack, and that it was their design, purpose and intent by the means aforesaid and by affirmative acts of concealment to induce and procure a decree of this Honorable Court, and to have the same continued in force, distribut-
[fol. 8] ing the impounded moneys in accordance with the compromise agreed upon at the conference in the Muehlebach Hotel in Kansas City, Missouri, hereinbefore referred to, and which said compromise was effect by fraud, corruption and bribery; that the concealment of said transactions hereinbefore set out by the defendants and each of them, was so effective that neither this Court nor any officer thereof, nor any officer of the United States knew or could, by the exercise of the utmost diligence, have had any knowledge thereof; that in March of the year 1939, in the course of an investigation made by a United States grand jury sitting at Kansas City, Missouri, for the Western District of Missouri, inquiring into an attempt on the part of the defendant T. J. Pendergast to evade and defeat income tax due to the Government of the United States for the years 1935 and 1936, the defendant A. L. McCormack, in furtherance of the agreement aforesaid, for a long period of time denied and concealed all information relative to the corrupt and fraudulent transactions between himself, the other defendants and the said Charles R. Street; that during the course of the grand jury inquiry the said defendant A. L. McCormack was repeatedly requested by the defendant R. E. O'Malley to continue to conceal and to keep from the United States grand jury and the United States Attorney and his assistants conducting the investigation before the grand jury, all knowledge and information concerning said fraudulent and corrupt transactions; and that the said A. L. McCormack did so conceal and deny said transactions until on or about the 17th day of March, 1939, at which time he made a full and complete disclosure of all of the fraudulent and corrupt transactions between himself, the other defendants and Charles R. Street, to the United States grand jury and to the then United States Attorney, Maurice M. Milligan, and the agents of the Intelligence Unit of the Treasury Department of the government of the United States of America.

WHEREFORE, and in consideration of the above and foregoing corrupt, fraudulent and unlawful acts on

the part of the defendants and each of them to procure from this Court a decree embodying a compromise so unlawfully obtained, amounting to an obstruction of the due administration of justice, and being in utter disregard of the rights of the Court, and tending to bring the Court into disrespect and disrepute, the said Acting United States Attorney, Richard K. Phelps, prays that the said defendants, A. L. McCormack, R. E. O'Malley and T. J. Pendergast, be ordered to appear before the Court on a date to be fixed, and then and there to show cause, if any shall there be, why they should not be held as in contempt of Court; that they should be so held in contempt and should be punished by fine and imprisonment as the Court [fol. 9] may deem proper; that they should be ordered held in custody of the United States Marshal or in such penal institution as may be designated by this Court; and for all such other, further and different remedial or punitive orders as the Court shall deem just and proper.

Richard K. Phelps
Acting United States Attorney

Richard K. Phelps, first having been duly sworn upon his oath, says that he is the Acting United States Attorney for the Western Judicial District of the State of Missouri, and that, acting in such capacity, he has given to the Court the above and foregoing information; that the facts stated therein are true according to his best information and belief.

Richard K. Phelps

Subscribed and sworn to before me this 13th day of July, 1940.

(Seal) A. L. Arnold

[fol. 10] (Rule to Show Cause.)

In the District Court of the United States for the Western District of Missouri Central Division United States of America, Plaintiff, vs. [Thimas] J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, Defendants. Before Judges Kimbrough Stone Albert L. Reeves Merrill E. Otis a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

Whereas on the 13th day of July, 1940, there was filed in this court and before the undersigned judges the veri-

fied information of Honorable Richard K. Phelps, Acting United States Attorney for the Western District of Missouri (a copy of which information is hereto attached and made a part hereof as fully as if set out herein in haec verba), wherein it is charged that Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack have been guilty of contempt of this court, constituted of the undersigned judges, at the times, by the acts and in the manner set out in the information:

Now, Therefore, IT IS ORDERED that the said Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack show cause on or before September 1, 1940, by a return or returns in writing to this Rule to Show Cause, why they and each of them should not be held in contempt of this court.

It is further Ordered that the United States Marshal for the Western District of Missouri forthwith serve a copy of this Rule to Show Cause upon each of the defendants named in the information and that he make due return showing service.

(Seal)

Kimbrough Stone
Circuit Judge
Albert L. Reeves
District Judge
Merrill E. Otis
District Judge

(To avoid duplication the Information attached to the Rule to show cause is here omitted)

Filed in the United States District Court Aug. 10, 1940

[fol. 11] (Motion of Thomas J. Pendergast to Abate and Quash Information and Withdraw Rule to Show Cause.)

Comes now defendant, Thomas J. Pendergast, and moves the Court to abate and quash the Information filed herein and to withdraw the rule to show cause based thereon for the following reasons:

(1)

This three-judge District Court is a Court of limited statutory jurisdiction and is without jurisdiction, power

or right to hear, determine, or act in these contempt proceedings.

(2)

Neither the regular one-judge District Court for the Central Division of the Western District of Missouri, nor this three-judge District Court has jurisdiction, power or right summarily to proceed against, try or punish this defendant for the alleged contempt or for the alleged contemptuous acts stated in the Information to have been committed by this defendant because such alleged contempt did not constitute misbehavior on the part of this defendant in the presence of the District Court for the Central Division of the Western District of Missouri or of this Court or so near thereto as to obstruct the administration of justice within the meaning of Section 385 of Title 28 U.S.C.A.

(3)

The Information filed herein does not state facts sufficient to constitute a contempt of this Court.

[fol. 12]

(4)

It appearing on the face of the Information that the alleged contemptuous acts charged to this defendant were not committed in the presence of the Court or so near thereto as to obstruct the administration of justice, said Information is insufficient to support or authorize a rule to show cause why this defendant should not be held in contempt.

(5)

The Information filed herein charges this defendant with the commission of acts, for which alleged acts this defendant was indicted by a Grand Jury in the United States District Court for the Western Division of the Western District of Missouri on July 13th, 1940; a copy of which indictment is attached hereto, marked Exhibit "A", and incorporated herein by reference as though set out herein in full; that said indictment is based on an alleged violation of a criminal statute of the United States (Section 241 of Title 18), punishable by fine and imprisonment; that said indictment is now pending in said Court; that the allegations of the Information filed herein and the allegations of said indictment, in so far as they attempt to charge

this defendant with wrongful acts, are in substance the same; that the evidence necessary to prove the allegations of the Information is identical with the evidence necessary to prove the allegations of the indictment; that, therefore, this Court has no power or authority or right under the Constitution and laws of the United States to proceed to try this defendant for contempt.

(6)

To require this defendant to undergo a trial on the Information for contempt and also to undergo a trial on the aforesaid indictment, would violate defendant's constitutional right, contained in Amendment 5 of the Constitution of the United States, not to be subject for the same offence to be twice put in jeopardy.

(7)

To require this defendant to undergo a trial on the Information for contempt would violate defendant's constitutional right contained in Amendment 5 not to be held to answer for a capital or other infamous crime unless [fol. 13] on a presentment or indictment or a Grand Jury, and his constitutional right contained in Amendment 6 to a trial by an impartial jury.

(8)

By Section 385 of Title 28 U.S.C.A., the Congress of the United States provided that the [pwoer] of the federal courts to punish for contempts of their authority shall not extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness or other person to any lawful writ, process, order, rule, decree, or command of the said courts.

By Section 241 of Title 18 U.S.C.A., the Congress provided for the punishment of those who corruptly influence, obstruct or impede the due administration of justice in any Court of the United States.

Said Sections 385 and 241 (which originated in a common act, the Act of March 2, 1831) complement each

other and were not intended to and do not provide for double prosecution or double punishment for the commission of the same act or acts.

(9)

The allegations in the Information upon which the charge of contempt of court is based are identical with the allegations set out in the indictment returned against this defendant, as heretofore set out; that the allegations of the Information, if proved, would prove the allegations of the indictment and that the allegations of the indictment, if proved, would prove the allegations of the Information; that, therefore, this defendant is entitled under the law to the protection afforded him by the Amendments to the Constitution of the United States commonly called the Bill of Rights and he may not lawfully be required to answer said Information and Rule or Order to Show Cause or to be tried thereon.

[fol. 14] (10)

The Information filed herein shows upon its face that the alleged contemptuous acts charged against this defendant were committed more than three years prior to the filing of the Information herein; that, therefore, any prosecution for said alleged contemptuous acts is barred by the statute of limitations in such case made and provided.

WHEREFORE, this defendant respectfully moves the Court to abate and quash the Information filed herein and to withdraw the Rule to Show Cause heretofore issued by this Court.

Thomas J. Pendergast

R. R. Brewster
Jno. G. Madden
Attorneys for Thomas J. Pendergast

(The exhibit attached to this Motion, being the Indictment in cause No. 14912, is [ommitted] for the reason that it is set out hereafter in the Bill of Exceptions)

Filed in the United States District Court Aug. 31, 1940

[fol. 15] Motion of Defendant Robert Emmett O'Malley To Abate and Quash Information and Withdraw Rule to Show Cause.)

Comes now defendant Robert Emmett O'Malley and moves the court to abate, quash and for naught hold the information filed herein and to withdraw the rule to show cause, based thereon, and to discharge defendant Robert Emmett O'Malley, for the following reasons:

I

This Honorable Court is a court of special, restricted and limited statutory jurisdiction and power, [impeneled] for a specific purpose under and by virtue of Section 266 of the Judicial Code of the United States of America, Section 1, 43 U. S. Statutes at Large, 938, (Title 28, Section 380, U. S. C. A.) to perform the specific function and duty and to exercise the specific power and jurisdiction for which said statute provides, and said court is without jurisdiction, power, authority, or right to act, hear, determine, decide, or otherwise function in this contempt proceeding.

II

Neither the Judge of the District Court for the Central Division of the Western District of Missouri nor this Honorable Court, consisting of three judges [impeneled] in the cause entitled, "American Insurance Company, a Corporation, vs. Joseph B. Thompson, Superintendent of the In-[fol. 16] surance Department of the State of Missouri, and Stratton Shartel, Attorney General of the State of Missouri, Number 270", has any jurisdiction, power, authority, or right to try or to punish this defendant for the alleged contempt, or for the alleged contemptuous acts alleged in said information to have been committed by this defendant, for the reason that such alleged acts do not constitute contempt within the meaning of Section 268 of the Judicial Code of the United States of America, Section 268, 36 U. S. Statutes at Large, 1163, (Title 28, Section 385, U. S. C. A.) in that the acts alleged do not constitute misbehavior of said defendant in the presence of this court or the District Court aforesaid, or so near thereto as to obstruct the administration of justice within the meaning of said Section, and that the information filed herein shows upon its face that said alleged contemptuous acts with which this defendant is charged were not

committed in the presence of this court, or so near thereto as to obstruct the administration of justice, and that, therefore, said information does not state facts sufficient to support a rule to show cause why this defendant should not be held in contempt of this court.

III

The information filed herein upon which said rule to show cause is based charges this defendant with the commission of certain acts, for which such alleged acts this defendant has been indicted by a grand jury in the United States District Court for the Western Division of the Western District of Missouri, entitled as follows: "United States of America, Plaintiff, vs. T. J. Pendergast, R. E. O'Malley, A. L. McCormack, Defendants, No. 14,912", and "United States of America, Plaintiff, vs. T. J. Pendergast, R. E. O'Malley, A. L. McCormack, Defendants, No. 14,937", which said indictments are attached hereto, marked Exhibits "A" and "B", and incorporated herein, by reference, with the same force and effect as though set out herein in haec verba; that said indictments are now [fol. 17] pending in said court and that the allegations of the information filed herein and the allegations of said indictments charge this defendant with the same alleged acts and are in substance the same; that the evidence necessary to prove the allegations of this information is identical with the evidence necessary to prove the allegations of each of said indictments; and that for this court to proceed against or try to punish this defendant for contempt, or any order, judgment or decision of this court adjudging this defendant guilty of contempt, or any action of this court in the premises, would be in violation of Article V of the Amendments to the Constitution of the United States which, in part, provides, "No person shall * * * be deprived of life, liberty or property without due process of law", in that it would deprive this defendant of his liberty and property without due process of law.

IV

Any action of this court requiring defendant to undergo a trial on the information for contempt, and any order, judgment or decree of this court adjudging defendant guilty of contempt, and any action of this court in the premises, would be in violation of Article V of the Amend-

ments to the Constitution of the United States, which provide, in part, as follows: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb", in that defendant would be forced, also, to undergo a trial on the aforesaid indictments, and defendant for the same offense would twice be put in jeopardy of life and limb.

V

Any action of this court requiring defendant to undergo a trial on the information for contempt, and any order, judgment or decree of this court adjudging defendant guilty of contempt, and any action of this court in the [fol. 18] premises, would be in violation of Article V of the Amendments to the Constitution of the United States, which provides, in part, as follows: "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury", in that any such action will hold and compel defendant to answer for an alleged infamous crime without a presentment or indictment by a grand jury, and in that the rule issued by this court requiring defendant to show cause why he should not be held in contempt, and the information filed herein, if it charges any offense, charges an offense against the peace and dignity of the United States, and not a contempt of this court.

VI

Any action of this court requiring defendant to undergo a trial on the information for contempt, and any order, judgment or decree of this court adjudging defendant guilty of [ceontempt], and any action of this court in the premises, would be in violation of Article VI of the Amendments to the Constitution of the United States, which, in part, provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury * * *", in that defendant would be denied the right to a trial by an impartial jury in a criminal prosecution.

VII

Section 268 of the Judicial Code of the United States of America, Section 268, 36 U. S. Statutes at Large, 1163, (Title 28, Section 385, U. S. C. A.) provides that the

power of federal courts to punish for contempt of their authority shall not extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or any [fol. 19] other person, to any lawful writ, process, rule, decree, or command of the said courts. Section 135 of the Criminal Code of the United States of America, Section 135, 35 U. S. Statutes at Large, 1113, (Title 18, Section 241, U. S. C. A.) provides for the punishment of those who corruptly influence, obstruct, or impede, or endeavor to influence, obstruct or impede the due administration of justice in any court of the United States. Said Section 268 of the Judicial Code of the United States of America and Section 135 of the Criminal Code of the United States of America, (which originated as Sections 1 and 2 of the Act of March 2, 1831, complement each other and were not intended to, and do not, provide for double prosecution and double punishment of a defendant charged with the alleged commission of the same act or acts.

VIII

The facts alleged in the information upon which the charge of contempt of court is based and upon which the rule of this Honorable Court was issued are identical with the facts alleged and set out in the indictments aforesaid returned against this defendant in the United States District Court for the Western Division of the Western District of Missouri, and that the allegations of the information, if proved, would prove the allegations of said information, and that, therefore, this defendant is entitled under the law to have the allegations of the indictment tried before an impartial jury, and that pending such trial he may not lawfully be required to answer said citation for contempt nor to be tried upon the information filed herein.

IX

The information filed herein shows upon its face that all of the alleged contemptuous acts complained of were committed more than one year prior to the institution of this contempt proceeding, and, therefore, such proceeding is barred by Section 25, 38 United States Statutes [fol. 20] at Large, 740. (Title 28, Section 390, U. S. C. A.)

X

The information filed herein shows upon its face that all of the alleged contemptuous acts were committed more than three years prior to the filing of such information herein; and, therefore, any prosecution for said alleged contemptuous acts is barred by the Statute of Limitations in such cases made and provided.

XI

The information filed herein does not state facts sufficient to constitute a contempt of this court.

WHEREFORE, this defendant moves the court to abate and quash and for naught hold the information filed herein, to withdraw the rule to show cause heretofore issued by this court, and to discharge this respondent.

Robert Emmett O'Malley
Defendant.
James P. Aylward
George V. Aylward
Terence M. O'Brien
Attorneys for Robert Emmett O'Malley.

Service of above motion acknowledged
this day of August, 1940.

Acting United States Attorney.

(The exhibits attached to this Motion, being the Indictments in causes Nos. 14912 and 14937, are omitted for the reason that they are hereafter set out in the Bill of Exceptions)

Filed in the United States District Court Aug. 31, 1940

[fol. 21] Motion of Defendant A. L. McCormack to With-Draw Rule to Show Cause and to Abate and Quash Information.)

Now comes defendant A. L. McCormack and moves the Court to abate and quash the Information filed here and to

withdraw Rule to Show Cause based thereon, for the following reasons:

(1) The Information filed herein does not state facts sufficient to constitute a contempt of this Court.

(2) The Information filed herein does not state facts sufficient to give this Court jurisdiction, power or right to hear, determine or act in these contempt proceedings.

(3) This Court has no jurisdiction summarily to proceed against this defendant for the alleged contempt stated in the Information to have been committed by this defendant or to try or punish him therefor, because said alleged contempt, as stated in the Information, did not happen in the presence of the Court [fol. 22] or so near thereto as to obstruct the administration of justice, within the meaning of Section 385 of Title 18, U.S.C.

(4) The allegations in the information are insufficient to support or authorize a Rule to Show Cause why this defendant should not be held in contempt.

(5) Section 385 of Title 28, U.S.C., and Section 241 of Title 18, U.S.C., have a common origin, to-wit, the Act of March 2, 1831. It was the intent of Congress that each section should complement the other section, but it was not intended by Congress and said sections do not provide for double prosecution or double punishment for the commission of the same act or acts.

(6) This defendant was indicted by a grand jury in the United States District Court, Western District of Missouri, Western Division, on July 13, 1940, a copy of which indictment is attached hereto, marked Exhibit "A", and incorporated herein by reference as though set out herein in full; said indictment is based on an alleged conspiracy (Section 88, Title 18) to violate a criminal statute of the United States (Section 241, Title 18, U.S.C.); said indictment is now pending in said Court; the allegations of said indictment and the allegations of the Information filed herein are in substance the same, insofar as they attempt to charge this defendant with wrongful acts; that the evidence necessary to prove the allegations of the Information filed herein is identical with the evidence necessary to prove the

allegations of the indictment referred to above; to require this defendant to undergo a trial on the Information for contempt and also to undergo a trial on the aforesaid indictment would violate this defendant's con-
[fol. 23] stitutional right under the Fifth Amendment to the Constitution of the United States not to be subject, for the same offense, to be twice put in jeopardy.

(7) To require this defendant to undergo a trial for contempt on the Information herein would violate defendant's constitutional rights under the Fifth Amendment not to be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury.

(8) The alleged acts of contempt pleaded in the Information were, if committed, committed more than one year next before the filing of the Information and any prosecution therefor is barred by the statute of limitations, Title 28, Section 390, U.S.C.

The information herein shows upon its face that the alleged contemptuous acts were committed more than three years p or to the filing of the Information herein; therefore, any prosecution for said alleged contempt or said alleged contemptuous acts is barred by the statute of limitations in such cases made and provided.

(9) This three-Judge District Court is a court of limited statutory jurisdiction and is without jurisdiction, power or right to hear, determine or act in the contempt proceedings herein.

WHEREFORE, this defendant respectfully moves the Court to abate and quash the Information filed herein and to withdraw the Rule to Show Cause heretofore issued herein by this Court.

James Carroll
St. Louis, Mo.
Forest W. Hanna,
K. C., Mo.
Attorneys for Defendant
A. L. McCormack

Filed in the United States District Court Sept. 3, 1940

[fol. 24] (Opinion on Overruling of Motions of Defendants to Abate and Quash Information and Withdraw Rule to Show Cause.)

In the District Court of the United States for the Western District of Missouri. United States of America, Plaintiff, vs Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, Defendants. No. 5040. a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

Before STONE, Circuit Judge, and REEVES and OTIS, District Judges.

OTIS, District Judge, delivered the opinion of the Court.

An information charging Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack with contempt of this statutory court was filed by the United States Attorney July 13, 1940. A full synopsis of the information is set out in the margin.* It is alleged in the information that the three individuals named had procured from this court a decree in a number of cases involving insurance rates in Missouri and involving the disposition of a huge fund impounded by the court, that they had obtained the decree by the bribery of the superintendent of insurance, one of the litigants, and by representations to the court that a settlement had been honestly arrived at by the parties. It was further of the essence of the information that the named individuals not only deceived and [tommitted] a fraud on the court, but that they con-

*The information sets out that there were filed in the Central Division of the Western District of Missouri on May 25, 1930, cases in equity numbered 270 to 426, seeking injunctions "forbidding the superintendent of insurance [interferring] with certain rates filed by insurance companies. That on July 2, 1930, temporary injunctions were issued. That a custodian was appointed to receive a certain excess of premiums, pending final decision of the cases. That a master was appointed to take and that he proceeded to take testimony. The information sets out that on June 18, 1935, motions for decrees were filed, setting up that settlements had been arrived at in accordance with a stipulation also filed. That on February 1, 1936, the court entered its decree in accordance with the stipulation, distributing approximately $8,000,000 in impounded funds as agreed to by the parties.

The information then charges that the stipulation of settlement and for distribution of funds and the consequent decree were induced corruptly and in contempt of court. That O'Malley conferred with McCormack asking him to confer with one Street, acting for the insurance companies, to get Street to confer with Pendergast about

tinued the original deception and fraud by affirmative [fol. 25] acts designed to prevent discovery by the court of the truth concerning the settlement.

On August 31, 1940, Pendergast and O'Malley separately filed substantially identical motions to abate and quash the information. On September 3, 1940, McCormack filed a like motion. These motions have been submitted on oral arguments and written briefs and are now to be ruled.

Of the several grounds set out in the motions three only have been presented in argument. We discuss them.

Jurisdiction

1. It is contended that this court "is a statutory tribunal of limited jurisdiction and that it is without jurisdiction in this proceeding." The reasoning of counsel is this:

This three-judge court is a three-judge court of the Central Division of the Western District of Missouri and is "a separate and distinct tribunal" of that division.

[fol. 26] Steers v. U.S. (SCCA) 297 Fed. 116, 118. By rule of court made pursuant to statute (Title 28, Sec. 27, U.S.C.) Judge Collet now is the federal district judge assigned to the Central Division. Judge Collet, therefore, and he alone, has jurisdiction of offenses committed against any federal district court (three-judge court or otherwise) sitting in and for the Central Division, pro-

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a possible settlement of the insurance litigation. That accordingly Street did confer with Pendergast. That Street told Pendergast he would pay a fee to bring about a settlement. That a fee of $500,000 was agreed upon. That a first instalment of $50,000 was paid. That a second installment of $50,000 was paid, of which $22,500 went to McCormack and $22,500 went to O'Malley. That later $330,000 was given by Street to McCormack and by McCormack to Pendergast, Pendergast keeping $250,000 and dividing $80,000 between O'Malley and McCormack. That a final payment of $10,000 was made by Street to McCormack and by McCormack to Pendergast. That the payments were made to buy the influence of Pendergast, to corrupt O'Malley to accept the settlement, and to obtain the decree by fraudulent means.

Finally it is charged in the information that Pendergast, O'Malley and McCormack agreed that, by affirmative acts of concealment, they would prevent discovery by the court of the bribery and fraud which had been committed to obtain the decree and that one or more of the three thereupon and thereafter perpetrated such affirmative acts of concealment which are specifically described.

vided the offense is an independent proceeding and not incidental to the original litigation pending before the three-judge court.

The reasoning is sound. The last mentioned hypothesis is error. The misbehavior charged against defendants may not constitute contempt (that is the next question to be considered) but accepting as true the allegations in the information, it was certainly misbehavior obstructing the administration of justice in cases pending before this three-judge court. Its punishment, if the allegations are proved and if contempt is shown, clearly is as incidental to the cases pending as interference with the administration of justice in any case is incidental to that case. Any contempt, not committed in the face of the court, must be incidental to some case. If the alleged misbehavior was not incidental to the case pending before the three-judge court, to what case was it incidental? The fact that misbehavior may be an independent crime under the laws does not mean, of course, that it may not be, as contempt, incidental to some principal case. In re Savin, 131 U.S. 267.

We resolve contention No. 1 against the movements.

[fol. 27] Is Contempt Charged? The "Order and Decorum" Argument.

2. The information in effect charges that the insurance companies, through McCormack, furnished Pendergast with money, which Pendergast used to bribe O'Malley to deceive this court so as to obtain a decree giving money held by the court to the companies. The conspiracy to act and the acts committed (except the final act through counsel) all were beyond the physical presence of the court. The second contention is that no act charged against any of defendants was of such a nature as to disturb the "order and decorum" of the court and that only acts of that character (and certain other acts which the alleged misbehavior obviously is not) can constitute contempt.

The whole argument in support of this contention is rooted in a dictum used by the Supreme Court in Ex Parte Robinson, 19 Wall. 505. In that case there was a

judgment against Robinson, that he had been guilty of contempt, bottomed on "the tone and manner" in which he made certain statements in open court, the statements themselves being not in substance contemptuous. The district judge sought to punish the contemnor by disbarment. The only question determined in the case was that disbarment was not such a punishment as could be imposed for contempt. In an incidental discussion of the statute (now Section 385, Title 28), the court said (the italics are ours) -

> "It limits the power of these courts in this respect to three classes of cases: 1st, where there has been misbehavior of a person in the presence of the courts, or so near thereto as to obstruct the administration of justice; 2d, where there has been misbehavior of any officer of the courts in his official transactions; and, 3d, where there has been disobedience or resistance by any officer, party, juror, witness, or other person, to any lawful writ, process, order, rule, decree or command of the courts. As thus seen the power of these courts in case punishments of contempts can only be exercised to insure order and decorum in their presence, to secure [faithfulness] on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments, and processes."

[fol. 28] The phrase "to insure order and decorum in their presence" in the dictum quoted is seized upon. It is perfectly obvious, however, to one who gives any thought to the matter, that the Supreme Court did not mean to say that the only "misbehavior" referred to in the statute was such as constituted an interference "with order and Decorum." Here was intended only an illustration of the misbehavior which might be punished as contempt. The reference is to order and decorum "in their presence," but the very words of the statute make punishable as contempt misbehavior not in the presence of the court, provided it is "so near thereto as to obstruct the administration of justice."

If any doubt at all could arise from the language of the Supreme Court in Ex Parte Robinson, it certainly was entirely dissipated in the later opinion in Toledo

Newspaper Co. v. United States, 247 U.S. 402. It was made perfectly clear by the opinion in that case that contempt was not restricted to interference with "order and decorum." When the opinion is read in connection with the opinion of the district court in the same case (220 Fed. 458) it is clear that it is the effect on the administration of justice which is the test of whether misbehavior is contempt. If the tendency of the misbehavior is to affect the administration of justice, it is contempt, whether it is in the presence of the court or at some point away from the presence of the court, whether it affects the order and decorum of the courtroom or does not affect them.

The court of Appeals for this circuit in Froelich v. United States, 33 F. (2d) 660, by its reasoning, entirely disposed of this second contention of defendants. Froelich had written a letter to an attorney in a case in which he reflected upon the integrity of Judge Sanborn, then district judge. The effect of the letter was to induce an affidavit of prejudice. The affidavit of prejudice affected the administration of justice. The act of writing the letter was held to be punishable contempt. The [fol. 29] Court of Appeals said -

> "* * undoubtedly one who seeks to induce an attorney in a case to file such an affidavit (i.e., an affidavit of prejudice) by laying before him false and malicious statements as to the uprightness and honor of a trial judge, if the result is the filing of an affidavit of bias and prejudice, does obstruct the administration of justice. That obstruction follows from the necessary rearrangement of judicial machinery and possible delays incident to the filing of such an affidavit."

The Statute of Limitations

3. The contempt charged was "misbehavior" in the "presence" of the court within the meaning of Section 385 of Title 28, U.S.C. The misbehavior became effective and was intended to become effective when the court was asked to hand down its decree and when that decree was continued in force by the court. While the most expanded meaning has been given to the word "presence" as used in the statute, no expanded meaning is required here. One who, either by himself or by his agent (perhaps by an agent wholly innocent), obtains a decree by repre-

sentations he makes or causes to be made in open court, in the very face of the court, of course, acts in the "presence" of the court. It is not needed that the companion words in the statute - "or so near thereto" (i.e., to the [pressence] of the court) "as to obstruct the administration of justice," be regarded. They only emphasize the fact that "presence" is to be broadly interpreted. The misbehavior need not be in the actual presence. It is sufficient if it is near enough so as "to obstruct the administration of justice." It is "near enough," although it takes place 500 miles away from the courthouse, if it does "obstruct the administration of justice." A letter mailed in London, addressed to a district judge in Missouri, delivered to him in chambers, falsely charging him with misconduct concerning a pending case, certainly is "misbehavior." It is committed, because it takes effect, in the "presence" of the court. At any rate it is "so near" [fol. 30] to the "presence" as to [obsstruct] the administration of justice. A consideration of a few of the decided cases will illuminate the subject.

In the leading case of In Re Savin, supra, the Supreme Court made it clear that "in the presence of the court" did not mean the personal presence of the judges or when court is in session. The contempt in that case was committed by an attempt to induce a witness not to testify. The inducement was in the jury room temporarily used as a witness room. The Supreme Court said that was misbehavior in the "presence of the court." "The court," said the Supreme Court, "is present in every part of the place set apart for its own use, and for the use of its officers, jurors and witnesses; and misbehavior anywhere in such place is misbehavior in the presence of the court."

The Ninth Circuit Court of Appeals, in Independent Publishing Co. v. United States, 240 Fed. 849, said that the publication of an article in a newspaper, copies of which would be seen by jurors sitting in a case in trial and containing an article attaching the character of the defendant then on trial, was contempt committed "in the presence of the court." The Court of Appeals said, "the misbehavior is committed where it takes effect." The court quoted with approval an opinion of the Supreme Court of Georgia to the effect that -

"The well established theory of the law is that, where one puts in force an agency for the commission of crime, he, in legal contemplation, accompanies the same to the point where it becomes effectual. * * So, if a man in the state of South Carolina criminally fires a ball into the state of Georgia, the law regards him as [accompanyig] the ball, and as being represented by it up to the point where it strikes."

[fol. 31] See also and particularly [Foelich] v. United States, supra.

The contempt charged in the information was on account of "misbehavior" in the "presence of the court." The contentions are made, however, (a) that the information shows on its face that the alleged misbehavior was committed more than three years before the information was filed and (b) that the three-year statute of limitations (Title 18, Sec. 582) applies to a contempt proceeding of the character here involved. These contentions must be examined.

(a) The information charges that the defendants by their acts of misbehavior procured this court's decree and so obstructed the administration of justice in this court. The information further charges that, to maintain that decree, well within three years before the information was filed, defendants committed certain other affirmative acts of concealment. ([McCormacm], for example, committed perjury to prevent discovery of the truth by this court).

Counsel point to what they think is an analogy. They say, in effect, if A robs a bank, the statute of limitations begins to run from the day the robbery is perpetrated. The fact that he conceals (by not revealing) the robbery does not toll the statute. And that undoubtedly is true. if the crime was completed when the bank was robbed.

A's crime consists not only of entering a bank with felonious intent, not only of stealing the moneys of the bank, but also of getting away with the loot. (Would anyone suggest that if a three year period - assuming a three-year statute of limitations - began to run at the moment A fled from the bank and before he had disposed of the loot, and if he was not indicted until more than three years after he fled from the bank, the statute would

protect him? Certainly not. At least it would not begin to run until the flight was ended and the loot concealed. But suppose the robber hides the loot in a cave and then maintains a guard outside the cave. That is active con- [fol. 32] cealment, a continuance (not by any mere failure to reveal the crime) of the crime. The statute will begin to run when the guard is taken down!)

In this matter, if there is any applicable statute of limitations, it began to run only when affirmative acts of concealment finally were discontinued.

(b) We have seen that the misbehavior alleged was not completed until well within a period of three years before the filing of the information. But suppose that was not the fact, what authority is there for saying that the three-year statute applies to a contempt proceeding for misbehavior in the presence of the court?

The language of the three-year statute provides that -

> "No person shall be prosecuted, tried or punished for any offense, not capital, except as provided in Section 584 of this title, unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed; * *."

While a most forceful argument can be made that this statute does not apply at all to any sort of a contempt proceeding (but only to those criminal prosecutions which are instituted by criminal indictments and criminal informations), that argument must be disregarded since the decision of the Supreme Court in Gompers v. United States, 233 U.S. 605. It was held in that case that the three-year statute does apply to a contempt proceeding for a violation of an injunction. The Supreme Court said, however, (l.c. 606) that in the court in which the contempt proceeding had taken place -

> "The inquiry was directed solely with a view to punishment for past acts, not to secure obedience for the future; and to avoid repetition it will be understood that all we have to say concerns a proceeding of this sort only, and further, only proceedings for such contempt not committed in the presence of the court."

[fol. 33] Thus, in the most careful manner possible, so there never could be any mistake about it, the Supreme Court said in the Gompers case that the ruling in that case had no application to a proceeding for contempt committed in the presence of the court. The intimation is most clear that such a contempt is in an entirely different category from contempt for violation of an injunction.

Although the Supreme Court thus expressly ruled that the Gompers case is no authority in a case of the character now before this court, we must, of course, consider whether the reasoning of the case is applicable here.

The gist of the reasoning in the Gompers case is that "contempts of the class under consideration" (l.c. 610) (i.e., violations of injunctions) are crimes because they "are infractions of the law, visited with punishment as such" and so possess "the most fundamental characteristics of crimes as that word has been understood in English speech." (l.c. 610) The thought is emphasized by pointing out (l.c. 612) that "The English courts * * leave the punishment of this class of contempts to the regular and formal criminal process."

It is clear from the language of the Supreme Court, despite the brevity of this characteristic Holmes opinion, that the reason why violation of an injunction is an offense within the meaning of the three-year statute is that it is "an infraction of law" (an injunction is a law) which may be "visited with punishment as such." Hence the distinction so clearly indicated from misbehavior in "the presence of the court." If one says to the presiding judge in open court - "Thou fool," he violates no law, but he is guilty of contempt, he has committed no "offense" against the United States, but he may summarily be punished. Contempt of that character is not "a crime" in any true sense.

[fol. 34] The Gompers case, when read carefully, really is authority for the proposition that the three-year statute does not apply to such a contempt as is charged here. Two other cases are cited (U.S. v. Goldman, 277 U.S. 229, and Hart v. Oil Co., 27 F. Supp. 713). The Goldman case, also dealing with the violation of an injunction, does no more than follow the Gompers case, with the [ssame] limitations. The court points out - "The only substantial dif-

ference between such a proceeding for criminal contempt and a criminal prosecution is that in the one the act complained of is the violation of a decree and in the other the violation of a law" (l.c. 235). And a decree is law. Punishment for the violation of a decree is essentially the same as punishment for the violation of a law (i.e., a statute). The basis for the conclusion reached is exactly the same as in the Gompers case. The opinions in both cases particularly point out that the proceeding before the court was contempt for violation of an injunction (which is the same as a law). The inference is that vindication of the authority and dignity of the court as against a contempt committed in its presence is an entirely different matter.

The Hart case, decided by the district court for the Eastern District of Texas, dealt with a matter which the court held was not contempt at all. It was not even suggested that and could not have been suggested that the matter (theft from a receiver appointed by the court) was contempt committed in the presence of the court. What, therefore, was said by the district judge in the line of extending the doctrine of the Gompers case to all kinds of contempt (a thing the Supreme Court specifically said it would not do) is unadulterated and erroneous dictum.

[fol. 35] The power to punish, as contempt, misbehavior committed in the presence of the court is an inherent power. Congress has not limited the time within which it may be punished. Perhaps there is an inherent limitation in the inherent power, a limitation arising out of laches - the punishment must not be unreasonably delayed. Certainly it is not unreasonably delayed if a proceeding for punishment is begun as soon as the misbehavior is discovered, particularly if the misbehavants, by concealment and fraud, have prevented discovery.

Conclusion.

4. Our conclusion is that there is no real merit in any of the contentions made in support of the Motions and that the Motions should be [overuled.]

Filed in the United States District Court Nov. 14, 1940

[fol. 36] (Order Overruling Motions of Defendants to Abate and Quash Information and Withdraw Rule to Show Cause.)

The several motions of Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack to abate and quash the information charging contempt of this court, and to withdraw the rule heretofore issued to show cause, having been duly considered by the Court and the Court being fully advised in the premises, are by the Court overruled for the reasons set out in the opinion of the Court this day filed. SO ORDERED.

It is further ordered that the defendants file answers to the information on or before the 14th day of December, 1940.

Kimbrough Stone
Circuit Judge
Albert L. Reeves
District Judge
Merrill E. Otis
District Judge

Filed in the United States District Court Nov. 14, 1940

[fol. 37] (Order Allowing Exceptions to Defendants to Overruling of Motions of Defendants to Abate and Quash Information and Withdraw Rule to Show Cause.)

To the order, filed herein on November 14, 1940, in which order the several motions of the defendants to abate and quash the information and withdraw the rule to show cause were overruled, the defendants, and each of them, are allowed exceptions. SO ORDERED.

Kimbrough Stone
Circuit Judge
Albert L. Reeves
District Judge
Merrill E. Otis
District Judge

Filed in the United States District Court Nov. 18, 1940

[fol. 38] (Order As to Time for Filing Answers.)

Now on this day it is by the Court ORDERED:

1. That the time heretofore fixed for the filing of answers herein be, and it hereby is, extended to and including December 18, 1940.

2. That, to expedite this proceeding, defendants are hereby granted leave in their answers to join with a plea of not guilty such other pleas or defenses, in bar or otherwise, as they may desire, without waiver of or prejudice to any right or defense under any or all of such several pleas or defenses.

Dated this 17th day of December, 1940.

Kimbrough Stone
Circuit Judge
Albert L. Reeves
District Judge
Merrill E. Otis
District Judge

Filed in the United States District Court Dec. 17, 1940

[fol. 39] (Separate Application of Thomas J. Pendergast for Order Extending Time to Plead and Authorizing Joinder of Other Pleadings with Plea of Not Guilty.)

Comes now the defendant Thomas J. Pendergast and asks the Court to make an order extending the time for this defendant to plead in the above cause and also authorizing joinder of other pleas with plea of not guilty, and in support of said motion states:

That by order entered November 14, 1940, the Court directed the filing of answers to the information herein on or before December 14, 1940; that it will be impossible for this defendant to file an answer without waiver of other defenses unless the Court directs that said other defenses be joined with defendant's plea of not guilty, with the provision that such joinder shall not constitute a waiver of such other defenses, and that such joinder is solely for the purpose of expediting said proceedings.

Defendant further states that in order to complete the preparation of all such pleadings it will be necessary that [fol. 40] time for pleading be extended at least four days from the date heretofore fixed.

WHEREFORE, by reason of the premises, this defendant asks for an order extending the time to plead until December 18, 1940, and permitting defendant to join in his answer with a plea of not guilty a plea of such other defenses, in bar or otherwise, as he may desire, without waiver of or prejudice to any right or defense under any or all of such pleas or defenses.

R. R. Brewster
John G. Madden
Attorneys for Defendant
Thomas J. Pendergast.

Filed in the United States District Court Dec. 18, 1940

[fol. 41] (Separate Special Plea in Bar and Answer of Defendant Thomas J. Pendergast to the Information and Rule to Show Cause.)

I.

Special Plea in Bar

Former [Jeoprrdy]

Comes now defendant Thomas J. Pendergast and for his special plea in bar to the Information for contempt and Rule to Show Cause based thereon, respectfully states:

1. That on or about July 13, 1940, a grand jury duly [impannlled] in and for the Western Division of the Western Judicial District of Missouri returned an indictment against this defendant and others, No. 14,912, charging defendants with conspiracy to obstruct justice in this Court, in violation of Section 241 of Title 18, U.S.C.A., a copy of which indictment is attached hereto, marked Exhibit A, and made a part hereof; that at about the same time, said grand jury returned another indictment against this defendant and others, No. 14,937, charging defendants with conspiracy to defraud the United States by obstructing justice in this Court in violation of Section 88 of Title 18, U.S.C.A., a copy of which indictment

is attached hereto, marked Exhibit B, and made a part hereof;

2. That the two cases instituted by said indictments came on for trial on November 18, 1940, in the United States District Court for the Western Division of the Western District of Missouri, the Honorable A. Lee Wyman, presiding, that on motion of the United States Attorney, [fol. 42] the Court ordered the two cases consolidated for trial, that a jury of twelve men (with another juror as an alternate) was duly [impenelled] and sworn to try said causes, that thereafter, the United States Attorney entered a nolle prosequi to each of the defendants in each of said cases and the Court thereupon ordered the defendants discharged;

3. That the offense attempted to be charged in the Information herein and the [allegtions] in support thereof are, in effect, identical with the offenses charged in said indictments and the allegations in support thereof, upon which indictments, this defendant was prosecuted and put in jeopardy as heretofore stated; that proof of the allegations of the Information would prove the allegations of said indictments and proof of the allegations of the indictments would prove the allegations of the Information; that to proceed further herein would violate this defendant's right granted by the Constitution of the United States and contained in the Fifth Amendment not to be subject for the same offense to be twice put in jeopardy and would constitute a void and unconstitutional exercise of power.

WHEREFORE, defendant prays that he be discharged and that the rule to Show Cause be withdrawn and the Information dismissed.

R. R. Brewster
John G. Madden
Attys for Defendant

Thomas J. Pendergast

[fol. 43] II.

Plea in Bar

Statute of Limitations

Without waiving the defense of former jeopardy or any other defense, defendant states that any prosecution un-

der the Information herein is barred by the Statute of Limitations in such case made and provided, that all of the alleged acts for which this defendant is charged with contempt occurred or were committed more than three years prior to the filing of the Information.

III.

Lack of Jurisdiction

Without waiving any other defense, defendant states that this three-Judge Court is without jurisdiction, power or right to hear, determine or act in these contempt proceedings, and that this three-Judge Court was wholly without jurisdiction in the Insurance litigation in which the alleged contemptuous acts are purported to have been committed, and that this three-Judge Court, at the times stated in the Information, was not a judicial body and was not exercising judicial functions and was without judicial authority; so that no contempt was or could be committed against it.

IV.

Plea of Not Guilty

Further answering, without waiving any other defense, defendant enters a plea of not guilty to the Information.

V.

Agreement Not to Prosecute

Further answering, without waiving any other defense, defendant states that in May, 1939, an indictment was pending against this defendant in the United States District Court for the Western Division of the Western District of Missouri, charging him in two counts with the offense of income tax evasion, that the United States of America, acting through the Honorable Maurice M. Milligan, then and now the United States District Attorney for the Western Judicial District of Missouri, and this de- [fol. 44] fendant, acting through his counsel with his knowledge, consent, authority and approval, entered into a valid agreement whereby defendant agreed to and did plead guilty to both counts of said Indictment for income tax evasion and that United States of America agreed that defendant would not be prosecuted for any past offense

against the United States allegedly committed by him, expressly including the alleged contempt of this Court, as attempted to be charged in this Information, that defendant entered the plea of guilty aforesaid in reliance on and pursuant to said agreement and has performed his part of the agreement, that by reason of said agreement, prosecution hereunder would be against public policy and the ends of justice and would violate the rights of this defendant secured thereby, that prosecution hereunder should be abated or at least held in abeyance for such time as may be required to permit defendant to apply to the Chief Executive of the United States for a pardon based upon said agreement.

VI.

Further answering, without waiving any defense heretofore set out, the defendant respectfully states that the three Judges before whom this proceeding is pending have heretofore, in the case of American Insurance Company, Plaintiff, vs. Ray B. Lucas (Successor to R. E. O'Malley) Superintendent of Insurance, et al, Defendants, No. 270, and companion cases, determined adversely to this defendant facts material to the issues in this case and made findings of fact adverse to this defendant upon practically every allegation of fact contained in the Information herein; that one of said Judges, the Honorable Merrill E. Otis, charged the grand jury which returned the two indictments against this defendant heretofore referred to; that the whole tenor of said charge indicated that he had determined in his own mind that this defendant was guilty of the charges later set out in said indictments, which are identical with the charges set forth in the Information herein; that after the defendant was indicted, he filed affidavits of bias and prejudice against said Judge and as a result thereof His Honor Judge Otis disqualified himself and granted the defendant a change of venue.

[fol. 45] Defendant further says that, prior to said two indictments heretofore mentioned, His Honor Judge Kimbrough Stone instructed the United States District Attorney to present to the grand jury later to be called evidence tending to show this defendant guilty of the offense of obstructing Federal justice; that the facts outlined by His Honor Judge Stone in said charge or request to the United States District Attorney were identical with the

facts and charges contained in the Information herein; that at said time His Honor Judge Stone stated in open Court that it was evident this defendant and others had committed an outrageous contempt of the Court; that in the findings of fact of the three-Judge Court in the case of American Insurance Company vs. Ray B. Lucas, et al said Court found in substance that this defendant had in fact committed every act contained in and relied upon in the Information filed herein; and that, in addition thereto, the settlement in said cause was procured by bribery and the Court was deceived and imposed upon by false presentation of the character of the settlement and that this Court was made an innocent instrument in the perpetration of a [fruad] upon the interested policyholders by effectuating the settlement agreement procured by bribery.

Defendant respectfully says that, in view of all the circumstances, defendant, with the greatest deference to the Court and with the highest regard for each of the Judges comprising the same, respectfully brings these matters to the attention of the members of this Court for their consideration in determining whether, under all the circumstances of this case, they should sit as tryers of the fact as to defendant's guilt or innocence of the charges contained in the Information.

WHEREFORE, premises considered, defendant prays for such judgments, orders and decrees as may be just and proper.

Thomas J. Pendergast
Defendant, Thomas J. Pendergast.

R. R. Brewster
John G. Madden
Attorneys for Defendant,
Thomas J. Pendergast.

Receipt is hereby acknowledged of copy hereof this 18th Dec 1940

Richard K. Phelps
Asst U S Atty

(Exhibits are omitted for the reason that they are hereafter set out in the Bill of Exceptions)

Filed in the United States District Court Dec. 18, 1940

[fol. 46] (Separate Application of Robert Emmett O'Malley for Order Extending Time to Plead and Authorizing Joinder of Other Pleadings with Plea of Not Guilty.)

Comes now the defendant Robert Emmett O'Malley and asks the Court to make an order extending the time for this defendant to plead in the above cause and also authorizing joinder of other pleas with plea of not guilty, and in support of said motion states;

That by order entered November 14, 1940, the Court directed the filing of answers to the information herein or or before December 14, 1940; that it will be impossible for this defendant to file an answer without waiver of other defenses unless the Court directs that said other defenses be joined with defendant's plea of not guilty, with the provision that such joinder shall not constitute a waiver of such other defenses, and that such joinder is solely for the purpose of expediting said proceedings.

Defendant further states that in order to complete the [fol. 47] preparation of all such pleadings it will be necessary that time for pleading be extended at least four days from the date heretofore fixed.

WHEREFORE, by reason of the premises, this defendant asks for an order extending the time to plead until December 18, 1940, and permitting defendant to join in his answer with a plea of not guilty a plea of such other defenses, in bar or otherwise, as he may desire, without waiver of or prejudice to any right or defense under any or all of such pleas or defenses.

James P. Aylward
George V. Aylward
Terence M. O'Brien
Ralph M. Russell
Attorneys for Robert Emmett O'Malley, Defendant

Filed in the United States District Court Dec. 18, 1940

[fol. 48] (Return of Robert Emmett O'Malley to Rule to Show Cause and Information.)

Defendant Robert Emmett O'Malley, for his return to the rule to show cause and the information herein, respectfully pleads and states as follows:

(1)

Said defendant O'Malley pleads not guilty to the information filed herein and to the rule to show cause issued pursuant thereto.

(2)

Further, by way of return, said defendant O'Malley states that this Honorable three-judge District Court is a court of special, restricted and limited statutory jurisdiction and power, impaneled for a specific purpose under and by virtue of Section 266 of the Judicial Code of the United States of America, Section 1, 43 U. S. Statutes at Large 928 (Title 28, Section 380, U. S. C. A.), to perform the specific function and duty and to exercise the specific power and jurisdiction for which said statute provides, and said court is without jurisdiction, power, authority or right to act, hear, determine, decide or [other-[fol. 49] with] function in this contempt proceeding:

(3)

Further, by way of return, said defendant O'Malley states that neither the Judge of the District Court for the Central Division of the Western District of Missouri nor this Honorable Court, consisting of three judges impaneled in the cause entitled "American Insurance Company, a Corporation, vs. Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri, and Stratton Shartel, Attorney General of the State of Missouri, No. 270", has any jurisdiction, power, authority or right to try or to punish this defendant for the alleged contempt, or for the alleged contemptuous acts alleged in said information to have been committed by this defendant, for the reason that such alleged acts do not constitute contempt within the meaning of Section 268 of the Judicial Code of the United States of America, Section 268, 36 U. S. Statutes at Large 1163 (Title 28, Section 385, U. S. C. A.), in that the acts alleged do not constitute misbehavior of this defendant in the presence

of this court or the District Court aforesaid, or so near thereto as to obstruct the administration of justice within the meaning of said Section, and in that the information filed herein shows upon its [fact] that said alleged contemptuous acts with which this defendant is charged were not committed in the presence of this Court or so near thereto as to obstruct the administration of justice, and in that said information does not state facts sufficient to support a rule to show cause why this defendant should not be held in contempt of this Court.

(4)

The information filed herein does not state facts sufficient to constitute a contempt of this Court. Further, by way of return, said defendant O'Malley states that the information filed herein does not state facts sufficient to [fol. 50] constitute a contempt of this Court.

(5)

Further, by way of return, said defendant O'Malley states that it appears upon the face of the information filed herein that the alleged contemptuous acts charged to this defendant were not committed in the presence of this Court or so near thereto as to obstruct the administration of justice, and said information is insufficient to support or authorize a rule to show cause why this defendant should not be held in contempt.

(6)

Further, by way of return, said defendant O'Malley states that any action of this Court requiring this defendant to undergo a trial on the information for contempt, and any order, judgment or decree of this Court adjudging defendant guilty of contempt, and any action of this Court in the premises, would be in violation of Article 6 of the Amendments to the Constitution of the United States, which, in part, provides: "In all criminal prosecutions the accused shall enjoy the right to a speedy and impartial trial by a jury * * *", in that defendant would be denied the right to a trial by an impartial jury in a criminal prosecution.

(7)

Further, by way of return, said defendant O'Malley states that the information filed herein shows upon its face that all of the alleged contemptuous acts complained of were committed more than one year prior to the institution of this contempt proceeding, and, therefore, such proceeding is barred by Section 25, 38 U. S. Statutes at Large, 740, (Title 28, Section 390, U. S. C. A.).

(8)

Further, by way of return, said defendant O'Malley states that the information filed herein shows upon its face that all of the alleged contemptuou. acts were com- [fol. 51] mitted more than three years prior to the filing of such information herein; and, therefore, any prosecution for said alleged contemptuous acts is barred by the Statute of Limitations in such cases made and provided.

(9)

Further, by way of return, said defendant O'Malley states that this prosecution and this proceeding is barred by the Statutes of Limitations, and particularly by Section 25, 38 U. S. Statutes at Large, 740, (Title 28, Section 390, U. S. C. A.).

(10)

Further, by way of return, said defendant O'Malley states that this prosecution and this proceeding are barred by the Statutes of Limitations in such cases made and provided.

(11)

Further, by way of return, said defendant O'Malley states that the information filed herein upon which said rule to show cause is based charges this defendant with the commission of certain acts, for which such alleged acts this defendant was indicted by a grand jury in the United States District Court for the Western Division of the Western District of Missouri, entitled as follows: "United States of America, Plaintiff, vs. T. J. Pendergast, R. E. O'Malley, A. L. McCormack, Defendants, No. 14,-912", and "United States of America, Plaintiff, vs. T. J. Pendergast, R. E. O'Malley, A. L. McCormack, Defendants, No. 14,937", which said indictments are attached to the

motion of defendant Robert Emmett O'Malley to abate and quash information and withdraw rule to show cause heretofore filed in this proceeding, and said indictments are, by reference, incorporated herein with the same force and effect as though set out herein in haec verba; that the allegations of the information filed herein and the allegations of each of said indictments charged this [fol. 52] defendant with the same alleged acts and are in substance the same; that the evidence necessary to prove the allegations of the information herein is identical with the evidence necessary to prove the allegations of each of said indictments; that heretofore, and on or about the 18th and 19th days of November 1940, said indictments and each of same came on for hearing and trial before the Honorable A. Lee Wyman, sitting as United States District Judge for the Western Division of the Western District of Missouri; that said indictments were by said Court duly and properly ordered consolidated for trial; that this defendant was put to trial upon said indictments and each of same as consolidated, as aforesaid; that in said trial upon said indictments a jury was selected, impaneled and sworn; that this defendant in said trial was placed and put in jeopardy of life and limb; that after said jury had been sworn and this defendant had been put in jeopardy of life and limb, as stated, said indictments and each of same were dismissed and this defendant was discharged by said Court; that for this Court now to proceed against or try to punish this defendant for contempt, or any order, judgment or decision of this Court adjudging this defendant guilty of contempt, or any action of this Court in the premises, would be in violation of Article V of the Amendments to the Constitution of the United States which, in part, provides: "No person shall be * * * subject for the same offense to be twice put in jeopardy of life or limb * * *"

(12)

Further, by way of return, said defendant O'Malley states that any action of this Court requiring this defendant to undergo a trial on the information for contempt, and any order, judgment or decree of this Court adjudging this defendant guilty of contempt, and any action of this Court in the premises would be in violation of Article V [fol. 53] of the Amendments to the Constitution of the United States, which provides, in part, as follows: "No

person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury * * *", in that any such action will compel and hold the defendant to answer for an alleged infamous crime without a presentment or an indictment by a grand jury, and in that the rule issued by this Court requiring this defendant to show cause why he should not be held in contempt and the information filed herein, if it charges any offense, which this defendant denies, charges an offense against the peace and dignity of the United States, and not a contempt of this Court.

(13)

Further, by way of return, said defendant O'Malley states that any action of this Court requiring this defendant to undergo a trial on the information for contempt, and any order, judgment or decree of this Court adjudging this defendant guilty of contempt, and any action of this court in the premises, would be in violation of Article V of the Amendments to the Constitution of the United States, which, in part, provides as follows: "No person shall * * * be deprived of life, liberty or property without due process of law * * *", in that any such action would deprive this defendant of his liberty and property without due process of law.

(14)

Further, by way of return, said defendant O'Malley states that this prosecution and this proceeding is barred by the Statutes of Limitations in such cases made and provided, and that any contention or holding that such Statutes of Limitations do not bar this prosecution or this proceeding because these defendants, or any of them, failed and omitted to testify or give evidence against themselves would be in violation of, and contrary to, Article V of the Amendments to the Constitution of the United States, which, in part, provides: "No person shall * * * be compelled in any criminal case to be a witness against him-[fol. 54] self * * *"

(15)

Further, by way of return, said defendant O'Malley states that Section 268 of the Judicial Code of the United States of America, Section 268, 36 U. S. Statutes at Large

1163, (Title 28, Section 385, U. S. C. A.), provides that the power of federal courts to punish for contempt of their authority shall not extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or any other person, to any lawful writ, rule, process, decree, or any command of said courts; that Section 135 of the Criminal Code of the United States of America, Section 135, U. S. Statutes at Large 1113, (Title 18, Section 241, U. S. C. A.) provides for the punishment of those who corruptly influence, obstruct, impede, or endeavor to influence, obstruct or impede the due administration of any court in the United States; that said Section 268 of the Judicial Code of the United States of America and said Section 135 of the Criminal Code of the United States of America (which originated as Sections 1 and 2 of the Act of March 2, 1831) [compliment] each other and were not intended to, and do not provide for double prosecution and double punishment of a defendant charged with the alleged commission of the same act or acts.

(16)

Further, by way of return, said defendant O'Malley states that any action of this Court requiring this defendant to undergo a trial on the information for contempt, and any order, judgment or decree of this Court adjudging this defendant guilty of contempt, and any action of this Court in the premises, would be in violation of Article V of the Amendments to the Constitution of the United States, which provides, in part, as follows: "No person [fol. 55] shall be * * * subject for the same offense to be twice put in jeopardy of life or limb * * *", in that this defendant has heretofore been put in jeopardy of life and limb upon a trial of the indictments aforesaid, and in that after such trial this defendant was discharged, and in that the alleged offense charged in the information filed herein is the same offense as that charged upon each of said indictments, and in that to proceed now to try this defendant or adjudge this defendant guilty upon the information filed herein would be to compel this defendant to be put in jeopardy of life and limb for a second time for the same offense.

(17)

Further, by way of return, said defendant O'Malley states that in May 1939, a certain indictment (which had been returned by the grand jury in the United States District Court for the Western Division of the Western District of Missouri) was pending against this defendant, charging him in two counts with the federal offense of income tax evasion; that while said indictment was pending and before trial thereon, said defendant's counsel, with the knowledge, consent, authorization and approval of this defendant, conferred with the Honorable Maurice M. Milligan, then United States District Attorney for the Western Division of the Western District of Missouri and in charge, as the representative of the United States, of the prosecution of this defendant under said indictment and of all investigations then being made of this defendant, to ascertain what, if any, other federal offense had allegedly been committed by him, for the purpose of discussing with said United States District Attorney the possibility of this defendant's entering a plea of guilty to the indictment aforesaid; that during the discussion which followed between this defendant's counsel and the United States District Attorney, this defendant's counsel stated that this defendant would enter a plea of guilty on both counts of [fol. 56] the indictment aforesaid if he could be assured by the United States District Attorney, representing the United States, that there would be no further indictment or prosecution in any form of this defendant for any other alleged offense against the United States; that it was thereupon agreed between this defendant, acting through his counsel, and the United States, acting through the United States District Attorney, that if this defendant would enter a plea of guilty on both counts of said indictment, the said United States would, and thereupon did, agree that there would be no further indictment or prosecution of this defendant for any offense against the United States theretofore committed, and, more particularly, that there would be no indictment or prosecution of this defendant on account of any alleged contempt of court, obstruction of justice, conspiracy to obstruct justice, income tax evasion, or any other offense connected directly or indirectly with the insurance rate litigation; that thereafter this defendant, relying upon the promise and agreement of the United States, and pursuant thereto, did, on the 27th day of May 1939, enter a plea of guilty,

as agreed, on both counts of the said indictment thus pending as aforesaid; that thereafter the Honorable Merrill E. Otis, Judge of the United States District Court for the Western Division of the Western District of Missouri, sentenced this defendant upon said plea of guilty to the indictment aforesaid and that this defendant, in pursuance of said sentence and judgment of said Court, paid the fine assessed and served the entire sentence, except time for good behavior, in the Federal Penitentiary at Leavenworth, Kansas, and since his release therefrom this defendant has faithfully agreed and kept all the conditions of the parole imposed upon him at the time of said sentence that this defendant has in all respects and at all times duly performed the terms and conditions of said agreement with the United States; that the United States admits the execution and existence of the agreement here-[fol. 57] inbefore alleged and its due performance at all times by this defendant; that this proceeding and this prosecution is being conducted by the United States of America; that this proceeding and this prosecution is being conducted by the United States of America as plaintiff; that this prosecution and this proceeding is being conducted by the United States District Attorney for the Western Division of the Western District of Missouri, and his assistants as representatives of the United States of America; that this prosecution and this proceeding is a prosecution and proceeding by and between United States of America, on the one hand, and this defendant, on the other; that the prosecution of this proceeding constitutes a prosecution or proceeding for an alleged offense against the United States of America and against the laws of the United States of America; that this proceeding and the prosecution of same are contrary to and in violation of the agreement aforesaid; that because of the foregoing, public policy and the ends of justice require that the agreement of this defendant with the United States be in good faith carried out; that, by reason of said agreement, of defendant's plea of guilty entered in reliance thereon, the payment of the fine assessed against him and the service by him of the sentence thereunder imposed, this defendant has an absolute right to the barring of the further prosecution of this information and the dismissal of this proceeding and this prosecution.

WHEREFORE, said defendant O'Malley moves and prays the Court to abate and quash, and for naught hold

the information filed herein; to withdraw the writ to show cause heretofore issued by this Court, to sustain each and every ground and allegation of this return, to find adjudge and decree that this defendant is not guilty of the charge made by the information, and to discharge [fol. 58] this defendant.

James P. Aylward
George V. Aylward
Terence M. O'Brien
Ralph M. Russell
Attorneys for Defendant Robert Emmett O'Malley.

Service of above return acknowledged this 18 day of December, 1940.

Richard K. Phelps, Ass't
For the United States
District Attorney.

Filed in the United States District Court Dec. 18, 1940

[fol. 59] (Answer of the Defendant, A. L. McCormack to the Rule to Show Cause, Including Pleas in Bar and Demurrer.)

COMES NOW A. L. McCormack, one of the defendants in the above entitled cause and in response to the order of this three judge court to show cause why he should not be punished for contempt and answering the information filed herein, respectfully states to the court as follows, to-wit:

A - Plea in Bar

This defendant states that heretofore and on or about the day of July, 1940, a Grand Jury, duly impanelled, in the Western Division of the Western District of Missouri, returned an indictment numbered 14912, charging this defendant and the others herein with conspiracy to obstruct justice, in violation of Section 241 of Title 18,

U.S.C.A., a copy of which indictment is attached hereto and made a part hereof as Exhibit "A", and that said Grand Jury also returned its indictment against this defendant and the others herein No. 14937 charging conspiracy to defraud the United States, in violation of Section 88 of Title 18, U.S.C.A., a copy of which indictment is attached hereto and made a part hereof as Exhibit "B"; that thereafter and on or about the 18th day of November, 1940, on motion of the United States, the two said causes were consolidated, and the said consolidated causes came on for trial before the Hon. A. Lee Wyman, presiding, and that a jury of twelve men (with a 13th juror as an alternate) was impanelled and sworn to try said cause; that [fol. 60] thereafter the United States entered a nolle prosequi to each of the defendants, including this defendant, and thereupon the court ordered the defendants discharged.

This defendant says that the allegations contained in each of said indictments and that the proof to sustain said allegations are in effect identical with the allegations contained in this information and the proof necessary to sustain these allegations, and that this defendant for the reasons aforesaid has been in a former jeopardy with respect to the allegations contained in this information, and that to proceed further in this cause will violate this defendant's right granted by the Fifth Amendment of the Constitution of the United States, wherein it is provided that no defendant shall be subject for the same defense to be twice put in jeopardy.

Further answering, by way of plea in bar, and without waiving any other defenses, this defendant states that this three judge court is without jurisdiction to hear and determine this cause for the reason that this court was without jurisdiction in the said rate litigation in which the said alleged contemptous acts herein set out and alleged to have been committed.

Further answering, and by way of a plea in bar and without waiving any other defenses set out herein, this defendant says that any alleged contemptuous acts set out in this information and charged to have been committed by this defendant, were all committed or occurred

more than three years prior to the filing of this information.

B - Demurrer

Further answering, and without waiving any of the other defenses contained herein, this defendant demurs to the information and rule to show cause for the reason that this court is without jurisdiction in these proceedings and for the further reason that the said information does [fol. 61] not state facts sufficient to set out a cause of action against this defendant.

WHEREFORE, this defendant prays the court to be discharged and that the information and rule to show cause be dismissed.

C - Plea of Not Guilty

Further answering, the said A. L. McCormack, defendant herein, and without waiving any of the other defenses contained herein enters his plea of not guilty to the information.

WHEREFORE, this defendant prays that he be discharged and for such other judgments, orders and decrees as may be just and proper.

Forest W. Hanna
Attorney for Defendant,
A. L. McCormack

Copy received this 21st day of December, 1940, and objections to the form and manner of the special [please], demurrer and plea of not guilty are hereby waived, in like manner as the order of the court of Dec. 17, 1940.

Maurice M. Milligan
United States District Attorney
By Charles F. Lamkin, Jr.
Asst U S Atty

Filed in the United States District Court Dec. 21, 1940

[fol. 62] (Opinion.)

In the District Court of the United States for the Western District of Missouri - Central Division United States of America, Plaintiff, vs Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, Defendants. No. 5040* a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

Before KIMBROUGH STONE, Circuit Judge, ALBERT L. REEVES and MERRILL E. OTIS, District Judges.

The opinion of the Court was delivered by OTIS, District Judge.

The case concerns contempt charged to have been committed against this three-judge court by Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack. The case of Nye and Mayers, Petitioners, v. The United States of America and Guthrie, . U.S. , was decided by the Supreme Court April 14, 1941, after the trial of this case had begun. The reliance of learned counsel for defendants here is chiefly on the decision in that [fol. 63] case. This Court, of course, accepts in its full extent what was decided by the Supreme Court. But if ingenious counsel have misinterpreted that decision, out of an understandable inclination to save their clients from punishment for what was the grossest misbehavior against the administration of justice in a federal court of which there is any record known to us, this court is not bound by their misinterpretation. We think the Supreme Court will spurn it as unthinkable. We think the Supreme Court will make it clear to all that, while - as was ruled in the Nye and Mayers case - it is not punishable contempt for an individual, at a point one hundred miles away from the seat of justice, to persuade a litigant to

*It should be noted that while this proceeding in contempt was given by the clerk a separate number, No. 5040, it always was a proceeding purely incidental, and was so regarded by the court and all the parties, to the insurance litigation referred to in the findings of fact herein and in this opinion. It should be noted also that while the cases involved in the insurance litigation were filed in the Central Division of the Western District, all of the proceedings, by the consent of all the parties thereto, and all of the proceedings in connection with the trial of the proceeding in contempt, with the consent of all the parties, were had in Kansas City, in the Western Division of the Western District, where the judges were more easily assembled.

sign and mail a letter to a judge directing the dismissal of his case, it is punishable contempt for an agent of fire insurance companies and a political "Boss" (whose influence was bought by the payment to him of $440,000) and a bribed state official (to whom $62,600 was paid in bribery) and a fourth individual, the go-between of the principal conspirators, in open court, in the presence and face of the court, grossly to deceive and hoodwink the judges constituting the court, and by that deception fraudulently to obtain decrees (inter alia) disposing of an impounded fund of $10,000,000, so prostituting the court to their venal purposes and exposing its judges to the possibility of disgrace and to certain humiliation. What is presented in this case is as distinguishable from the facts in the Nye and Mayers case as night is from day.

Findings of Fact

We state at once the essential facts (they are stated [fol. 64] here as formal findings of fact):*

1. On May 28, 1930, one hundred and thirty-nine insurance companies filed one hundred and thirty-seven separate injunction suits against the Superintendent of Insurance and the Attorney General of Missouri to protect proposed increase of premium rates for fire, windstorm and hail insurance filed by the companies with the superintendent. Thereupon this three-judge court was constituted. Temporary injunctions thereafter were entered upon conditions, one of which was that the companies might collect the increased rates pendente lite but must deposit the amount of the increase so collected with a custodian of the court to await the ultimate outcome of the suits. Deposits were made aggregating $10,000,000.

2. One Charles R. Street, now deceased, was the agent of the companies. Thomas J. Pendergast was a political "Boss" with almost dictatorial power residing in Kansas City. R. Emmett O'Malley, a creature of

*The full history of the fraud which was perpetrated on the court and of its effect upon the insurance litigation is set out in the opinion of this court filed August 14, 1940, and in the supplemental opinion filed April 12, 1941. Those opinions have been published and may be read in ..... F.Supp. .....

Pendergast, was Superintendent of Insurance and a party-defendant in the suits. A. L. McCormack was an insurance agent residing in St. Louis.

3. Before final determination of any of the suits Street, Pendergast, O'Malley and McCormack conspired and agreed together that the insurance companies (acting through Street) and O'Malley would enter into a pretended or fake settlement of the suits, whereby the interest of policyholders would be sacrificed and 80% of the impounded fund would be paid to the companies. It was a part of the conspiracy - and it was effected by Street, Pendergast, O'Malley and McCormack - that Street, as agent of the companies, would pay Pendergast for his influence with and control over O'Malley the total [sus] of $750,000 ($440,000 actually was paid to Pendergast), with a portion of which O'Malley should be bribed to betray the policyholders ($62,500 was paid O'Malley) and with another portion of which McCormack was to be compensated for his services as messenger between Street, [Pedergast] and O'Malley (McCormack was paid $62,500). It was a part of the conspiracy - and it was effected by Street, Pendergast, O'Malley and McCormack - that when the fake settlement of the suits finally was agreed on by Superintendent O'Malley and Street, the fake settlement was reached in the Muehlebach Hotel in Kansas City, about six blocks from the United States Court House where the suits were pending) the attorneys for the Superintendent and the companies (the attorneys being ignorant of the corruption and fraud) would present to the court, in open court, as a basis for motions for decrees, the fake settlement, as a genuine, good-
[fol. 65] faith settement by antagonistic litigants. The fake settlement was presented to the court June 22, 1935, by Street, Pendergast, O'Malley and McCormack through and by their messengers. The court, the members of which were grossly deceived by the lying, false and fraudulent representation made in open court at the instance of Pendergast, O'Malley, Street and McCormack, entered the decrees February 1, 1936. The deception practiced on the court was vicious misbehavior, committed and consummated in the presence of the court and in open court. It was intended and calculated to mislead and deceive the court and to obtain fraudulent judgments and decrees. The deception was

a continuing deception, was intended to exert its deceiving, pernicious and poisonous influence indefinitely, and until and unless discovered by the court. The deception was fortified and renewed by affirmative supplemental acts of deception committed as later as March, 1939.

4. When the court discovered (early in 1939) - through investigations of government agents into suspected income tax evasions and consequent grand jury inquisitions (the matter also was formally called to the court's attention by motions filed May 29, 1939) - that it had been victimized and its decrees obtained by gross imposture and fraud perpetrated upon it in open court and in the presence of the court, it requested the United States Attorney to file an information in contempt. The information in this case, filed at last on July 13, 1940, resulted.

The Nye and Mayers Case

1. There never has been the slightest word of denial by the testimony of any person or even by the assertion of counsel in argument that the defendants were not guilty of the misbehavior revealed in the findings of fact. Except for McCormack, who confessed, the defendants did not take the stand. They stood on their technicalities. Two of the defendants, Pendergast and O'Malley, entered pleas of guilty in this district court (Pendergast on May 22, 1939, O'Malley on May 27, 1939), before one of its judges, to attempts to evade the payment of income taxes on receipts of the very money the insurance companies paid them for [thier] services in deceiving and misleading the court and they had been [sentended] to and had served sentences in the penitentiary for attempted evasion of taxes.*

[fol. 66] That they got the money is a fact that stands out like Pike's Peak! They were paid $440,000. For what?

*The whole history of the criminal cases which resulted in the imposition of sentences on Pendergast and O'Malley for attempted evasions of income taxes, including much which throws light upon the background of the present proceedings in contempt, is set out in United States v. Pendergast and O'Malley, 28 F.Supp. 601. It is there made emphatically clear that Pendergast and O'Malley were sentenced only for the offenses charged against them and to which only they entered pleas of guilty, namely, attempted income tax evasions.

The misbehavior is confessed or had as well be confessed. As long as Toledo Newspaper Co. v. United States, 247 U.S. 402, declared the law as it did declare the law until April 14, 1941 - misbehavior of the character of this obviously was punishable contempt. But counsel seem to argue that the Nye and Mayers case lays down an astounding doctrine -- misbehavior, to be punishable contempt, even if committed in the presence of the court, must be of that character of misbehavior which disturbs the peace of the courtroom.

The Supreme Court espouses in the opinion of April 14, 1941, no such emasculating and destructive doctrine as counsel in this case would thrust upon it. Quite the contrary. The case dealt only with the proper interpretation of the phrase "so near thereto" in the statute (Judicial Code, Sec. 268; 28 U.S.C.A., Sec. 385) providing that "the power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence or so near thereto as to obstruct the administration of justice. . ." It did not involve the companion phrase - misbehavior "in the presence of" the court. The court expressly cited with approval, as illustrating misbehavior "in the presence of the court," punishable as contempt, Savin, Petitioner, 131 U.S. 267 and Cooke v. United States, 267 U.S. 517. The misbehavior in the Savin case was an attempt to intimidate a witness in the jury room, used as a witness room, and an attempt to intimidate a witness in the hallway of the courthouse while court was in session in the courtroom. The judge and other officials knew nothing of the misbehavior until it was revealed at a time subsequent to its occurrence. Here, of course, was no disturbance of the peace, no uproar in the courtroom, no interference with order and decorum within any narrow meaning of those words. But the Supreme Court said Unanimously it was punishable [fol. 67] contempt committed "in the presence of the court." In the Cooke case the misbehavior was sending a letter to the judge. The letter was written by Cooke blocks away from the courthouse and was delivered by a messenger to the judge in chambers, court being then in a short recess, and, therefore, "in the presence of the court" (l.c. 535); and contempt for that it was "calculated to stir the judge's resentment and anger" (l.c. 534).

Unanimously the Supreme court said "the letter was contemptuous" (l.c. 534). Mr. Justice Holmes, whose dissent in the Toledo case is pointed to and relied on in the Nye and Mayers case, concurred in the opinion in the Cooke case.

"In the [Pressence] of the Court"

It is perfectly clear, then that the Supreme Court [dit] not intend to say and did not say in the Nye and Mayers case that only misbehavior which disturbs the peace of the courtroom is punishable contempt. "I do not understand my brethren to maintain that the secret bribery or intimidation of a witness in the courtroom may not be summarily punished," [i.e. punished as contempt], said Mr. Justice Stone in his dissenting opinion in the Nye and Mayers case; the Chief Justice and Mr. Justice Roberts concurring. Of course, the dissenting justices said that, in view of the approval by the majority of the Savin and Cooke cases.

What then is now the law of contempt as to misbehavior committed "in the presence of the court?". This much may be said with certainty - Any such misbehavior is punishable contempt, if it interferes with or tends to interfere with the administration of justice in some pending case.

Did the Nye and Mayers case change the interpretation of - "in the presence of the court," as that phrase was interpreted in the Savin case and in the Cooke case, approved by the Nye and Mayers case? There can be no pretence that it did so. What is done in the witness room or in the corridors or in the chambers of the judge [fol. 68] adjacent to the courtroom, while court is in session or during some [shoot] recess of court, is "in the presence of the court," whether what is done is or is not known to the presiding judge. The secret and whispered communication with the witness in the Savin case was [misbahvior] committed "in the presence of the court," although the judge knew nothing about it until a later time. The sending by messenger of a letter which is delivered to the judge in chambers during a recess, as in the Cooke case, is misbehavior "in the presence of the court" and punishable contempt. The Nye and Mayers case does not question these long established declarations

of law. The dissenting justices expressly said the majority of the court did not question them. Any careful study of the opinion supports the view that the majority does not question the meaning of "in the presence of the court" repeatedly declared in earlier decisions.

It is true that a superficial reading of the opinion in the Nye and Mayers case develops a little verbal support for the argument of counsel. The alleged contemnor in that case had persuaded a litigant, one Elmore, to sign a letter addressed to the judge. It was mailed. It was received by the judge. Where it was received, whether at the post office or in the chambers or at his home or at some other town than that in which court was being held, or, if in chambers, whether during a recess while court was in session (facts treated as essential in the Cooke case), none of these facts is stated either in the opinion of the Supreme Court or in the opinion of the Court of Appeals.* In short, nothing in the case remotely [fol. 69] suggests that any act of alleged contemnors either was committed or consummated "in the presence of the court." The court said - "So far as the crime of contempt is concerned, the fact that the judge received Elmore's letter is inconsequential." How superficial to conclude that the Supreme Court meant to say that if an alleged contemnor's contemptuous letter, signed and mailed by the contemnor, is delivered to the judge in chambers, while court is in session, that would not be punishable contempt! The Supreme Court said nothing of the kind and could not have said anything of the kind after just having approved what was said in the Cooke case. It cannot be argued that the Supreme Court meant to say that if Nye himself had written a letter of such a character as that to write it constitutes misbehavior, and himself had signed and mailed that letter to the judge of the court in which a case was pending, and if the letter so signed and mailed had been delivered to the judge in chambers and received by him while court was in ses-

*We have also examined the record in the Nye and Mayers case which the clerk of the Supreme Court was kind enough to send us. Not only does that record not disclose that the letter to the judge was delivered to him in chambers while court was in session, but it is a very reasonable inference from the facts disclosed that it was not delivered to him in chambers while court was in session.

sion, that then there would not have been contempt committed "in the presence of the court."

The misbehavior of the defendants in this case was committed in the very presence of the court and in open court. These defendants sent their messengers (their innocent and unsuspecting messengers) to the very courtroom and into open court (just as Cooke sent his messenger with his letter to the chambers of the court while court was in session). The misbehavior of these defendants was committed where it took effect and where it was intended to take effect. Except for what was contemplated should be done in open court, the misbehavior was without meaning or significance and would have been entirely futile. As was so well said by the Circuit Court of Appeals for the Ninth Circuit in Independent Publishing Co. v. United States, 240 F. 849, 856 - "the misbehavior is committed where it takes effect." In its opinion the Court of Appeals quoted the observation of the [fol. 70] Supreme Court of Georgia in Simpson v. State, 92 Ga. 41, 17 S.E. 984, 22 L.R.A. 248: - "The well established theory of the law is that, where one puts in force an agency for the commission of crime, he, in legal contemplation, accompanies the same to the point where it becomes effectual. . . So, if a man in the state of South Carolina criminally fires a ball into the state of Georgia, the law regards him as accompanying the ball, and as being represented by it up to the point where it strikes."

The Test of Probable Effect.

A repeatedly approved method of construing the meaning of an instrument, a statute, or a judicial opinion is to examine the possible and probable effects thereof. If the Nye and Mayers case means what counsel for defendants contend, then the only way to punish any of these parties for the outrageous imposition upon this court is by indictment and ensuing criminal prosecution. This is so because they contend that all contempts, other than breaches of decorum during court sessions, are included in that decision.

Breaches of decorum in a courtroom are, nearly always, trivial matters which can be easily controlled and can have little influence upon public respect for courts and even less upon the reaching of just results in courts.

They affect only the order in the courtroom. The contemptuous acts which break down public confidence in courts are those which improperly influence the fairness of trials and the justice of trial results. We cannot believe that the Supreme Court intended to hold that Congress has left to the courts power to protect themselves against trivial disturbances and has taken from them all power to protect themselves against acts which strike at the very heart of the administration of justice by the courts.

[fol. 71] What might be the effect upon respect for the courts and the administration of jus ice in them if this contention be sound? We do not have to go beyond matters connected with this litigation for the answer. First, there must be an indictment procured. Next there must be a criminal prosecution carried through to conviction. Most of this procedure is entirely beyond any control of the court which may have been grossly victimized by being innocently used as an instrument to effectuate injustice. What can happen? What has happened here?

As set forth hereinafter in more detail (under the heading "No Double Jeopardy"), Pendergast and O'Malley were indicted for failure to return, for income tax purposes, the very bribe money involved here. To procure pleas of guilty therein, the United States Attorney, as it now appears, agreed not to prosecute either of them for any other offenses connected with such transactions. One of the judges of this court caused to be presented to a subsequent grand jury this bribery transaction with the result of an indictment for obstruction of the administration of justice. That obstruction of justice was the procurement of the decrees of February 1, 1936, in these rate litigations, by this bribery. After impanelment of a petit jury in those prosecutions, the United States Attorney entered in each case a nolle prosequi. This he did in performance of the above agreement. Had this present contempt proceeding been by indictments, can it be doubted that the same ending would have resulted therein?

Thus we have the picture following. By gross bribery of a public official (Superintendent of Insurance O'Malley), representing several millions of policyholders and involving about $10,000,000.00, a court is innocently in-

duced to enter decrees disposing of such rights. The bribed are indicted for not returning the received bribe for income tax purposes. To procure pleas of guilty therein the United States Attorney agrees not to prosecute them [fol. 72] for the bribery transactions. If this indubitable contempt of this court can be reached only by indictment, it would not be prosecuted. In short, those who perpetrated a gross fraud against the administration of justice go scot free and the court which has been victimized is powerless.

What respect can the public have for a system which permits such results? Yet just such results would occur here and would be unpreventable by this court, if defendants have construed the Nye and Mayers case correctly. Surely, the Supreme Court did not mean to declare, in the Nye and Mayers case, that Congress intended to create such a possible situation by its enactment of Section 268 of the Judicial Code (28 U.S.C.A., Sec. 385).

Minor Points Considered

2. In addition to their argument that the Supreme Court by its decision in the Nye and Mayers decision has made the federal trial courts impotent to deal with the grossest sort of misbehavior, even if committed "in the presence of the court," unless it is a specific kind of misbehavior, namely, a disturbance of the courtroom peace, counsel advanced four other arguments. Counsel said they were not abandoning still other points, but these points they pressed: (1) A three-judge court has no jurisdiction under any circumstances to punish for contempt incident to a case pending before it; (2) The guilt of defendants was not proved beyond a reasonable doubt; (3) Defendants are saved by the statute of limitations; (4) Theoretically the defendants have been placed in double jeopardy by this proceeding. Concerning certain of these arguments already we have expressed our views. United States v. Pendergast, et al., 35 F. Supp. 593. We wish now only to supplement what we said in the opinion cited.

We shall not further discuss in this opinion the contention that a three-judge court cannot deal with contempt incident to a case pending before it. If a three-[fol. 73] judge court is the only eunuch among courts, if it alone cannot maintain its dignity and its authority,

let the declaration of its weakness and incompetence be made elsewhere than here.

3. We shall not discuss at [lentgth] the asserted failure to prove guilt beyond reasonable doubt. If the facts we have found do not prove guilt, guilt never can be proved in any case.

Even zealous counsel (and counsel for defendants are zealous, able and honorable) never, at any time, have asserted - we think they never will assert - that our finding that defendants were paid by the agent of the insurance companies $440,000 in connection with decrees to be secured in the insurance litigation in this court is not the truth. That the defendants got the money is a fact that stands out like Pike's Peak. They were paid $440,000. For what?

When counsel speak of facts not proved beyond a reasonable doubt evidently they refer to deductions the court has drawn from facts proved. Street gave McCormack, at different times, $440,000. [McCormak] carried the money which Street had given him to Pendergast. Pendergast gave O'Malley, out of the money received from Street through McCormack, $62,500, and gave McCormack $62,500. The whole transaction was for the express purpose of effecting a settlement of the insurance litigation which would give the companies 80% of the impounded fund. The court has deduced from these and other proved facts that there was a conspiracy between Street, Pendergast, O'Malley and McCormack to obtain decrees disposing of the impounded fund in accordance with the scheme of the conspirators. The court has deduced from the proved facts that Street, Pendergast, O'Malley and McCormack intended to and did execute the scheme, in the only way it could be executed, by procuring, in open court, in the presence of the court, through attorneys, ignorant of the background of the scheme and its corrupt and fraudulent [fol. 74] character, the decrees which were the whole object of the scheme. But these deductions are as completely and fully proved by the facts as the deduction that when X points a gun toward Y and fires and Y falls with a bullet hole in his forehead, Y has been shot by X, although no one testifies that he has seen the bullet on its way from the muzzle of the gun to the forehead of

the murdered man. Judges too may draw necessary and obvious inferences even as jurors may draw inferences.

Matter of Limitations

4. In our opinion in 35 F. Supp. we discussed fully the statute-of-limitations argument still urged upon us. We incorporate here by reference that opinion and briefly supplement what was there said. The whole theory of counsel is that the misbehavior of defendants ended when they caused false representations to be made to the court on June 22, 1935. That theory is unsound. So far as the court is concerned, that date was when the misbehavior of defendants commenced. The essence of the misbehavior was the deception practised on the court. If the truth had been revealed the next day after the false representations were made, of what value would the deception have been to the conspirators? It was intended that the deception planted on June 22, [d]1935, should exert its effect continually thereafter. So long as the deception continued to deceive - and it did that until early in 1939 - the misbehavior continued. The misbehavior here was the planting of a lie in the minds of the judges and in the records of the court, a lie whose emanations - like the baleful emanations of radium - would continue and were intended to continue to deaden the sensibilities of the victims imposed on for an indefinite period. If a criminal plants a bomb in his victim's residence which will explode in a month, when [ddoes] the statute of limitations begin to run, - when he plants the bomb, or when it does it devastating work. If a criminal plants in another's house some [fol. 75] receptable of noxious gas which slowly will exude its poison during months, when has his crime been completed, if six months afterward the gas exuding destroys a human life? Is not the crime completed then? The statute of limitations begins to run then.

Moreover, we have found the fact to be that defendants fortified and renewed their original and continuing deception by affirmative supplemental acts of deception committed as late as March, 1939. The particular acts of supplemental deception indicated by the evidence were (a) the solicitation by O'Malley of McCormack, that in McCormack's testimony to the grand jury he [sould] not reveal O'Malley's connection with the matter of obtaining the fraudulent decrees and (b) McCormack's first testi-

mony to the grand jury, in which he concealed by perjury his own, as well as Pendergast's and O'Malley's connection, with the deception of the court. We say that these were affirmative and supplemental acts of deception, [fortyfying] and [keepig] alive the original continuing deception. The deception conceived by the conspirators in its very nature involved the necessity that each of the parties should prevent discovery of the truth by any and every active means, should discovery of the truth ever seem to be impending. That was proved when the scheme to deceive was proved. When, therefore, O'Malley, learning that McCormack had been called to testify before the grand jury, took affirmative steps to stop McCormack's mouth, and when McCormack, being actually called to testify before the grand jury, concealed by perjury his and Pendergast's and O'Malley's connection with the fraudulent decrees, both O'Malley and McCormack, by affirmative acts, were carrying out the plan of all. The contention now made by counsel that because McCormack testified there was no express agreement to this effect means nothing. There was no formal agreement, of course. It is elementary that [fol. 76] a formal agreement need not be proved, when what was done reasonably may be inferred as having been agreed upon by the parties.

There is another thought which in this connection should not be overlooked. In one theory, sometimes hinted at in the decisions, the very essence of misbehavior "in the presence of the court" which makes it contempt of court is the effect of the misbehavior upon the mental balance of the judges who must decide cases pending. So in the Cooke case the Supreme Court said that the misbehavior there was contempt for that it was "calculated to stir the judge's resentment and anger." Now the lie which was planted in the court by the defendants here could not produce its effect of stirring the resentment and anger of the court until it was discovered by the court that it was a lie. And that did not happen in this case until the spring of 1939.

While we think, therefore, that there is no statute of limitations applicable to contempt committed "in the presence of the court," we think also that if there is, it did not begin to run in this case until the deception practiced by the defendants ceased to have effect nor until the last affirmative act fortifying the deception was com-

mitted by the conspirators, or one of them, nor until the essence of the contempt became an active principle, by the discovery of the truth.

No Double Jeopardy

5. The double-jeopardy argument remains to be considered but it can be disposed of in a short paragraph. The basis of the argument is this. In addition to the information charging contempt of court, which initiated the present proceeding, the grand jury also returned an indictment against defendants charging an attempt to [fol. 77] obstruct the administration of justice. The indictment was bottomed upon some, but not all, of the facts charged in the information in contempt. When the criminal case was ready for trial and a jury had been impanelled, the United States Attorney, then in Washington, wired the Assistant United States Attorney in charge of the prosecution to enter a nolle prosequi. This action was taken after the jury had been impanelled. The case was dismissed when the entry of Nolle prosequi was made.* There is not, however, the slightest suggestion

*The legal question presented is not affected by the background of the dismissal of the criminal case upon the entry of nolle prosequi. For the sake of the record, however, we desire to present the essential parts of that background in this footnote. The telegram of the United States Attorney is in the record. In the telegram he gave the reason for his action in entering a nolle prosequi of the criminal case. The reason given was that he had entered into an agreement with counsel for Pendergast and O'Malley, before they entered pleas of guilty to attempting to evade income taxes, that he would not prosecute them for other offenses, if they entered pleas. He believed that he should abide by that agreement, even as to an indictment returned during the term of another United States Attorney, and actively secured by that other United States Attorney.

This Court never had heard of the existence of any such agreement until the telegram dismissing the criminal case was made public. None of the judges of this court ever had heard from the United States Attorney of the existence of any such agreement until the telegram was made public. We do not state these facts in criticism of the United States Attorney. Indeed, on several occasions the two district judges of this court have attested their high regard for him and for his public services and they now reassert that high regard. His public services have been outstanding and deservedly have won for him the respect of the nation. We think he had the undoubted right to make the agreement - unless it included the bargaining away of this court's power to punish for contempt (and there has been no contention that the United States Attorney attempted that). In fairness to the United States Attorney, we desire to make it very clear that he never has said, so far as we are aware, that the agreement disclosed by his telegram was known to this court or to any of the judges of this court.

[fol. 78] that the dismissal was over the objection of the defendants, or any of them. It was not only not over [fol. 79] their objection, but clearly it was sought most earnestly by the defendants, who had done everything conceivably possible to be done to avoid trial. The law is that when a case has been dismissed by nolle prosequi, the defendants not objecting to the dismissal, the defendants have not been put in jeopardy. Craig v. United States (9CCA), 81 F. 2d 816. Certiorari Denied, 298 U.S. 690 - Rehearing Denied, 299 U.S. 620; Compare United States v. Shoemaker, 27 Fed. Cas. 1067, 106.

Conclusion

Upon the facts found to have been proved beyond a reasonable doubt and herein stated in our Findings of Fact we declare the defendants and each of them guilty of contempt of this court as charged in the information. The formal judgment will be embodied in a separate document. Also there will be embodied in a separate document the rulings of the court on objections to matters of evidence

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When Pendergast entered a plea to the charge of attempting to evade taxes, the United States Attorney stated in open court that he did not intend to prosecute him for certain other offenses he might have committed and he intimated that the court might take into consideration, in assessing punishment, other offenses. He said nothing about an agreement. Attorneys for Pendergast said nothing about an agreement and admitted none. There was on their part no confession or admission of any offense except that which was charged in the indictment. For that alone, said they, the defendant should be sentenced. There was not the slightest intimation by anyone that the plea of guilty was entered upon a condition that Pendergast would not be prosecuted for some other and graver crime. The court, in imposing sentence, immediately made it emphatically clear that Pendergast, pleading guilty to and confessing only the crime charged, could be sentenced only for the crime charged and confessed. When a week later, O'Malley was sentenced for attempting to evade taxes, once more it was made emphatically clear from the bench that he was sentenced only for the offense charged and confessed. Both he and Pendergast, said the court, might thereafter be charged with other offenses, in which event they would be entitled to due process of law. There was still no intimation of an agreement inconsistent with the court's declaration. See 28 F. Supp. 601.

The United [Staates] Attorney did not mention any agreement when he was requested by this three-judge court to institute contempt proceedings and to secure an indictment from the grand jury against any who had been guilty of obstruction of justice. On the contrary, he said he would undertake to comply with the request of the court. A year afterward, the Acting United States Attorney, who had been an Assistant United States Attorney at the time of the agreement, when he was requested by the court to institute a

in all instances where rulings were withheld at the trial. The time for imposing sentences will be announced hereafter and due notice thereof will be given to all concerned.

Filed in the United States District Court May 28, 1941

[fol. 80] (Judgment and Sentence, June 7, 1941.)

In the District Court of the United States for the Western District of Missouri Central Division. United States of America, Plaintiff, -vs- Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, Defendants. No. 5040 A proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

This proceeding in contempt coming on to be heard upon (a) the information filed by the United States Attorney at the direction of this court sitting in cases Nos. 270 to 426, inclusive, (b) the rule to show cause, and (c)

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contempt proceeding and to secure an indictment, if possible, did not say (we are sure he did not know) that there was any agreement that would constitute an obstacle to the prosecution of an indictment, if secured, or an information, if filed. Once more, after an interval, again Assistant United States Attorney, the same fine lawyer, has conducted this prosecution with courage and ability, never suggesting any agreement as an obstacle. When the indictment was returned and when the information was filed, and when the United States Attorney who had made the agreement had been reappointed United States Attorney, he did not intimate that there was any agreement which would prevent the prosecution of the indictment and of the information in contempt. He could have dismissed the indictment at any time. But the indictment was not dismissed until after a judge had been brought to Kansas City from South Dakota to try the case and until after a jury had been impanelled at great expense for the trial. A reasonable inference is that he made known the agreement then, at the instance and request of counsel for defendants, who themselves had kept in strictest secrecy the existence of an agreement until after Pendergast and O'Malley had been sentenced and the term had passed and sentences could not be changed. Counsel not only did not object to the nolle prosequi but were happy to escape trial by jury. If it was a part of their strategy that thereafter they would seek to avoid punishment for contempt by asserting defendants had been put in jeopardy under the indictment, we are certain the United States Attorney was not taken into their confidence.

All that the United States Attorney did was altogether legitimate and actuated by good and honorable motives. We advert to the matter only that the record may clearly show that neither this court nor any of its members ever had knowledge of any agreement with the defendants or their counsel that conceivably might be urged as preventing prosecution for contempt of court.

the answers of the defendants thereto; and the court having (a) judicially noticed the proceedings, files and records in cases Nos. 270 to 426, inclusive, for the limited purpose of ascertaining in this incidental proceeding the character of those cases and their status and condition on and prior to February 1, 1936, and (b) having heard the evidence offered by the parties in this incidental contempt proceeding and the argument of counsel, and (c) being fully advised in the premises, and (d) having filed herein its opinion, including its Findings of Fact and its conclusion touching the guilt of defendants, Now, Therefore,

IT IS ORDERED, ADJUDGED AND DECREED that -

1. The defendants, Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, are guilty of con- [fol. 81] tempt of this court; and that

2. The defendant, Thomas J. Pendergast, be and he is hereby sentenced to the custody of the Attorney General of the United States for imprisonment in an institution of the penitentiary type for a period of two years; the defendant, Robert Emmett O'Malley, be and he is hereby sentenced to the custody of the Attorney General of the United States for imprisonment in an institution of the penitentiary type for a period of two years; the defendant, A. L. McCormack, be and he is hereby sentenced to be on probation for a period of two years; and that

3. To conform with the fact, the clerk of this court shall add to the word and figures "No. 5040," wherever they appear after the style of this incidental proceeding, the words - "a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive;" and that

4. The costs of this incidental proceeding are assessed against the defendants Thomas J. Pendergast and Robert Emmett O'Malley.

Kimbrough Stone
Circuit Judge
Albert L. Reeves
District Judge
Merrill E. Otis
[Didstict] Judge

Filed in the United States District Court June 7, 1941

[fol. 82] (Motion of Defendant, Thomas J. Pendergast for New Trial.)

Comes now defendant, Thomas J. Pendergast, and moves the Court for a new trial, for each and all of the following reasons:

1. Because the Information herein fails to state a cause of action.

2. Because the Information shows upon its face that this proceeding is barred by the statute of limitations.

3. Because the Information shows upon its face that the alleged contemptuous acts charged against this defendant could not and do not constitute either contempt of this Court or contempt of this Court which the latter has any power, jurisdiction or authority to punish.

4. Because the Information shows upon its face that this Court is without jurisdiction herein.

5. Because the Court erred in over-ruling and denying the motion of this defendant to abate and quash the Information filed herein and to withdraw the rule to show cause, for each and all of the reasons therein appearing.

6. Because the Court erred in over-ruling and denying the motion of this defendant, at the close of the evidence of the United States, to declare this defendant not guilty and to dismiss this proceeding, for each and all of the reasons therein appearing.

[fol. 83] 7. Because the Court erred in over-ruling and denying, and in failing and refusing to sustain, the motion of this defendant at the close of all of the evidence to declare this defendant not guilty and to dismiss this proceeding, for each and all of the reasons therein appearing.

8. Because the Court erred in admitting and receiving, over the objections and exceptions of this defendant, incompetent, irrelevant and immaterial evidence.

9. Because the Court erred in excluding, over the exceptions of this defendant, competent, material and relevant evidence duly offered by this defendant.

10. Because the Court erred in overruling, and in failing and refusing to sustain, motions to strike incompetent,

irrelevant and immaterial evidence duly made by this defendant.

11. Because the Court erred in overruling, and in failing and refusing to sustain, motions duly made by this defendant to limit and restrict the effect of purported evidence.

12. Because the finding and judgment of the Court is against the law and the evidence.

13. Because the finding and judgment of the Court, and each part thereof, is unsupported by substantial evidence.

14. Because the finding and judgment of the Court is against the greater weight of the evidence.

15. Because the Court erred in failing and refusing to make each of the findings of fact duly requested by this defendant.

16. Because the Court erred in failing and refusing to declare this defendant not guilty for each of the reasons specified in the motion of this defendant, filed at the close of all of the evidence, to declare this defendant not guilty and to dismiss this proceeding.

17. Because the Court erred in making and entering its first finding of fact, for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside of the record of this cause.

[fol. 84] 18. Because the Court erred in making and entering its second finding of fact, for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside of the record of this cause.

19. Because the Court erred in making and entering its third finding of fact, for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside of the record of this cause.

20. Because the Court erred in making and entering its fourth finding of fact, for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside of the record of this cause.

21. Because each and every finding of fact by the Court (whether incorporated in the formal findings of fact or not) is against the evidence, is against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside of the record in this cause.

22. Because the Court erred in each and all of its conclusions of law.

23. Because the Court erred in holding that it possessed jurisdiction to entertain this proceeding.

24. Because the Court erred in holding that it possessed jurisdiction to punish for the alleged contempt sought to be charged herein.

25. Because the Court erred in holding that any acts of this defendant, shown by the evidence, constituted contempt of this Court.

26. Because the Court erred in holding that any acts of this defendant, shown by the evidence, constituted contempt of this Court punishable by this Court in this proceeding.

27. Because the Court erred in holding that this proceeding is not an independent action, proceeding or prosecution, but incidental or ancillary to the so-called insurance rate litigation.

[fol. 85] 28. Because the Court erred in holding that this prosecution, an action at law, is incidental or ancillary to the so-called insurance rate litigation, a proceeding in equity.

29. Because the Court erred in holding that this proceeding is not barred by the statute of limitations.

30. Because the Court erred in holding that under the law and the evidence this defendant is not subjected to double jeopardy.

31. Because the Court erred in failing and refusing to give full force and effect to the agreement between the United States District Attorney and this defendant, as shown in evidence, and its findings with reference thereto are unsupported by the evidence.

32. Because the Court erred in failing and refusing to find and declare this defendant not guilty.

33. Because the Court erred in failing and refusing to hold that a statutory three-judge Court is without jurisdiction to entertain, hear or determine a prosecution for criminal contempt initiated by Information on the part of the United States.

WHEREFORE, defendant Thomas J. Pendergast prays the Court to award him a new trial.

John G. Madden
James E. Burke
R. R. Brewster
Attorneys for Defendant,
Thomas J. Pendergast.

Filed in the United States District Court May 31, 1941
Refiled June 7, 1941.

[fol. 86] (Motion of Defendant, Robert Emmett O'Malley, to Revoke Order and for a New Trial.)

Comes now defendant, Robert Emmett O'Malley, and moves the court to set aside and revoke its order adjudging this defendant guilty of contempt of this court and to grant him a new trial for each and all of the following reasons:

1. Because the Information herein fails to state a cause of action.

2. Because the Information shows upon its face that this proceeding is barred by the statute of limitations.

3. Because the Information shows upon its face that the alleged contemptuous acts charged against this defendant could not and do not constitute either contempt of this Court or contempt of this Court which the latter has any power, jurisdiction or authority to punish.

4. Because the Information shows upon its face that this Court is without jurisdiction herein.

5. Because the Court erred in overruling and denying the motion of this defendant to abate and quash the Information filed herein and to withdraw the rule to show cause, for each and all of the reasons appearing in said motion to abate and to withdraw said rule to show cause.

[fol. 87] 6. Because the Court erred in overruling and denying the motion of this defendant, at the close of the evidence of the United States, to declare this defendant not guilty and to dismiss this proceeding, for each and all of the reasons therein appearing.

7. Because the Court erred in overruling and denying, and in failing and refusing to sustain, the motion of this defendant at the close of all of the evidence to declare this defendant not guilty and to dismiss this proceeding, for each and all of the reasons therein appearing.

8. Because the Court erred in admitting and receiving, over the objections and exceptions of this defendant, incompetent, irrelevant and immaterial evidence.

9. Because the Court erred in excluding, over the exceptions of this defendant, competent, material and relevant evidence duly offered by this defendant.

10. Because the Court erred in overruling, and in failing and refusing to sustain, motions to strike incompetent, irrelevant and immaterial evidence duly made by this defendant.

11. Because the Court erred in overruling, and in failing and refusing to sustain, motions duly made by this defendant to limit and restrict the effect of purported evidence.

12. Because the findings and judgment of the Court are against the law and the evidence.

13. Because the findings and judgment of the Court, and each part thereof, are unsupported by substantial evidence.

14. Because the findings and judgment of the Court are against the greater weight of the evidence.

15. Because the Court erred in failing and refusing to declare this defendant not guilty for each of the reasons

specified in the motion of this defendant, filed at the close of all of the evidence, to declare this defendant not guilty and to dismiss this proceeding.

[fol. 88] 16. Because the Court erred in making and entering its first finding of fact, for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside of the record of this cause.

17. Because the Court erred in making and entering its second finding of fact, for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside of the record of this cause.

18. Because the Court erred in making and entering its third finding of fact, for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside of the record of this cause.

19. Because the Court erred in making and entering its fourth finding of fact, for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside of the record of this cause.

20. Because each and every finding of fact by the Court (whether incorporated in the formal findings of fact or not) is against the evidence, is against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside of the record in this cause.

21. Because the opinion, findings and judgment of the Court contain broad and sweeping conclusions of law formulated upon other conclusions and not findings of fact and unsupported by any evidence in the record in this cause.

22. Because the Court erred in each and all of its conclusons of law.

[fol. 89] 23. Because the Court erred in holding that it possessed jurisdiction to entertain this proceeding.

24. Because the Court erred in holding that it possessed jurisdiction to punish for the alleged contempt sought to be charged herein.

25. Because the Court erred in holding that any acts of this defendant, shown by the evidence, constituted contempt of this Court.

26. Because the Court erred in holding that any acts of this defendant, shown by the evidence, constituted contempt of this Court punishable by this Court in this proceeding.

27. Because the Court erred in holding that this proceeding is not an independent action, proceeding or prosecution, but incidental or ancillary to the so-called insurance rate litigation.

28. Because the Court erred in holding that this prosecution, an action at law, is incidental or ancillary to the so-called insurance rate litigation, a proceeding in equity.

29. Because the Court erred in holding that this proceeding is not barred by the statute of limitations.

30. Because the Court erred in holding that under the law and the evidence, this defendant is not subjected to double jeopardy.

31. Because the Court erred in failing and refusing to give full force and effect to the agreement between the United States District Attorney and this defendant, as shown in evidence, and its findings with reference thereto are unsupported by the evidence.

32. Because the Court erred in failing and refusing to find and declare this defendant not guilty.

33. Because the Court erred in finding that there was evidence of a conspiracy on the part of this defendant and the other defendants to commit a contempt of this Court.

[fol. 90] 34. Because the Court erred in concluding upon its finding that there was a conspiracy on the part of this defendant and the other defendants to commit a contempt of this court.

35. Because the court erred in failing and refusing to hold that a statutory three-judge Court is without jurisdiction to entertain, hear or determine a prosecution for

criminal contempt initiated by Information on the part of the United States.

WHEREFORE, defendant, Robert Emmett O'Malley, prays the Court to revoke and set aside its order adjudging him guilty of contempt and to grant him a new trial.

James P. Aylward
George V. Aylward
Terence M. O'Brien
Ralph M. Russell
Attorneys for Robert Emmett O'Malley.

Received copy of foregoing motion for new trial and to revoke order this 2 June 1941

Richard K. Phelps
Asst U S Atty

Filed in the United States District Court June 2, 1941
Refiled June 7, 1941

[fol. 91] (Order Overruling Motions for New Trial.)

The defendants, Thomas J. Pendergast and Robert Emmett O'Malley, having filed, after the filing of the court's opinion and indicated judgment herein, but before the filing of the formal judgment, what are designated by them as motions for new trial:

IT IS ORDERED that the said motions for new trial, considered as petitions for rehearing and considered as having been refiled after the entry of the formal judgment, be and they are overruled.

Exceptions to this order are allowed the defendants Thomas J. Pendergast and Robert Emmett O'Malley.

Kimbrough Stone
Circuit Judge
Albert L. Reeves
District Judge
Merrill E. Otis
District Judge

Filed in the United States District Court June 7, 1941

[fol. 92] (Order Appointing Counsel to Represent Appellee.)

In the District Court of the United States for the Western District of Missouri Central Division. United States of America, Plaintiff, vs. Thomas J. Pendergast Robert Emmett O'Malley and A. L. McCormack, Defendants. No. 5040 A proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

This contempt proceeding, as a proceeding incidental to the insurance litigation (Equity Cases Nos. 270 to 426, inclusive), is, in no strict sense, an ordinary criminal case brought by the government against individuals. The office of United States Attorney, as such, is under no duty to carry on a proceeding of this character. This court requested Mr. Richard K. Phelps, then Acting United States Attorney, as amicus curiae, to prepare and prosecute the information in contempt. These things he has done with fine ability and the court desires publicly and on the record to express its appreciation of his services.

It now has been indicated that an appeal will be taken from the judgment of the court. The work incident to that appeal will be great. The court does not feel that the whole burden should be imposed on one man nor that the attorneys who represent the appellee, if an appeal is taken, should be uncompensated for their services. The court thinks they should be reasonably compensated and that it is right and proper that their compensation should [fol. 93] be taxed as costs in the insurance litigation to which this proceeding is incidental.

It is therefore ordered that Mr. Richard K. Phelps and Mr. William S. Hogsett be and they are hereby appointed as special counsel and as amici curiae to represent the appellee in any appeal taken from the judgment of this court in this proceeding.

Kimbrough Stone
Circuit Judge
Albert L. Reeves
District Judge
Merrill E. Otis
District Judge

Filed in the United States District Court June 7, 1941

[fol. 94] (Notice of Appeal of Defendant, Thomas J. Pendergast.)

In the District Court of the United States for the Central Division, Western District of Missouri. United States of America, Plaintiff, vs. Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, Defendants. No. 5040. a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

Name and address of Appellant: Thomas J. Pendergast, 5650 Ward Parkway, Kansas City, Missouri.

Name and address of Appellant's Attorneys: R. R. Brewster, Federal Reserve Bank Building, Kansas City, Missouri. John G. Madden, 2400 Fidelity Bldg., Kansas City, Missouri. James E. Burke, 2400 Fidelity Bldg., Kansas City, Missouri.

Offense: Contempt of Court.

Date of Judgment: June 7, 1941.

Brief Description of Judgment or Sentence: Defendant found guilty of contempt of Court. Sentence:

Name of prison where now confined, if not on bail: Defendant now on bail.

I, the above named appellant, hereby appeal to the United States Circuit Court of Appeals for the Eighth Circuit, from the judgment above mentioned on the grounds set forth below.

Thomas J. Pendergast
Appellant.

Dated June 7, 1941.

Service acknowledged above date
Richard K. Phelps, Asst. U. S. Atty. [amd] amicus curiae
By Charles F. Lamkin, Jr., Asst. U. S. Atty.

[fol. 95]

GROUNDS OF APPEAL:

1.

Because the three-judge Court erred in failing to hold that under the pleadings, the law and the evidence, this

defendant was not shown to be guilty of the offense sought to be charged in this proceeding.

2.

Because under the pleadings, the law and the evidence this defendant is entitled to judgment, and the three-judge Court erred in failing to render judgment on behalf of this defendant.

3.

Because the three-judge Court erred in failing to find the defendant not guilty of contempt of Court under the pleadings, the law and the evidence.

4.

Because the three-judge Court erred in not finding under the pleadings, the law and the evidence, that this defendant was not shown to be guilty of contempt which the three-judge Court had power or authority to punish.

5.

Because the three-judge Court was without jurisdiction to entertain, hear or determine this proceeding and erred in not so holding.

[fol. 96]

6.

Because the three-judge Court erred in assuming jurisdiction to entertain, hear or determine this proceeding in contempt, or to try or convict this defendant of the defense sought to be charged.

7.

Because the three-judge Court erred in assuming jurisdiction to punish this defendant for the alleged contempt sought to be charged.

8.

Because the three-judge Court was illegally convened at the inception of the insurance rate litigation mentioned in evidence (American Insurance Co. vs. Joseph B. Thompson, Superintendent of Insurance for the State of Missouri, et al., No. 270 In Equity, and companion cases bearing Docket Nos. 271 to 426, Incl.) and did not lawfully acquire jurisdiction therein.

9.

Because the three-judge Court was without jurisdiction to entertain, consider, approve or disapprove the purported settlement or stipulation of settlement of the insurance rate litigation mentioned in evidence, and erred in assuming, undertaking or entertaining such jurisdiction.

10.

Because the three-judge Court was without jurisdiction to disburse or supervise the disbursement of impounded funds mentioned in evidence.

[fol. 97]

11.

Because the purported settlement of the insurance rate litigation mentioned in evidence was a nullity and not susceptible of approval or enforcement by the three-judge Court, and the three-judge Court erred in holding that said matter was within its jurisdiction.

12.

Because, if the three-judge Court acquired jurisdiction of the insurance rate litigation mentioned in evidence (which this defendant denies) under the colorable averments of the bills filed, such jurisdiction was lost prior to the proceedings in said litigation relating to the purported settlement thereof; and that said three-judge Court thereafter had no power or authority under the law to act therein.

13.

Because, prior to the proceeding in the insurance rate litigation relating to the purported settlement thereof, the three-judge Court and the litigants in said insurance rate litigation recognized the constitutionality of the State statutes assailed in the bills in equity therein, and were proceeding solely upon the theory that the action of the Superintendent of Insurance of the State of Missouri under constitutional statutes was confiscatory; as a result, any jurisdiction it may have theretofore acquired was thereupon lost and the three-judge Court erred in proceeding thereafter, and was acting contrary to the terms and provisions of the Statutes of the United States authorizing the calling of a three-judge Court.

[fol. 98]

14.

Because the three-judge Court under the statutes in such cases made and provided, could have acquired no jurisdiction in the insurance rate litigation mentioned in evidence other than to grant or deny injunctive relief sought on the ground of the unconstitutionality of a State statute or State statutes; and that in purporting to entertain, hear, consider, approve and enforce the purported settlement of said insurance rate litigation, in whole or in part, the three-judge Court was acting extrajurisdictionally and its action was a nullity and void; and the three-judge Court erred in continuing to assert jurisdiction thereafter.

15.

Because the bills in equity filed by the insurance companies in the insurance rate litigation mentioned in evidence failed to state a cause of action, were not petitions or bills to review the action of the Superintendent of Insurance complained of, did not justify or authorize injunctive relief or any relief by the three-judge Court, were insufficient to authorize the creation or formation of a three-judge Court, and said three-judge Court sought to be convened, acquired no lawful jurisdiction and said three-judge Court erred in asserting jurisdiction or proceeding in said causes.

16.

Because the three-judge Court erred in charging this defendant with notice of the terms of the purported settlement, or that said purported settlement would be reduced to a written agreement and presented to the three-judge Court for its approval, or that said three-judge Court [fol. 99] would act thereon, when such settlement was a nullity and when said three-judge Court was without jurisdiction or authority to act thereon.

17.

Because the three-judge Court erred in asserting jurisdiction to direct the disbursement of the impounded funds mentioned in evidence in accordance with the purported settlement of said insurance rate litigation, or in taking any action thereon.

18.

Because the three-judge Court at the time of the alleged contempt charged herein was not a lawfully constituted court or exercising any lawful or constitutional or statutory jurisdiction, and its proceedings were erroneous and extrajurisdictional.

19.

Because at the time of the institution of this proceeding the three-judge Court was not a lawfully constituted court or exercising any lawful or constitutional jurisdiction, and the three-judge Court erred in attempting to assert jurisdiction herein.

20.

Because the three-judge Court, convened as a court of limited statutory jurisdiction, was without authority or jurisdiction to entertain, hear or determine this proceeding.

21.

Because this proceeding was and is an independent action at law and not a part of the original proceeding in equity over which the three-judge Court was attempting [fol. 100] to assert jurisdiction; and said three-judge Court therefore was without jurisdiction herein.

22.

Because this proceeding is a prosecution for alleged criminal contempt and the three-judge Court is vested with no jurisdiction thereover.

23.

Because this proceeding was neither instituted nor maintained for the benefit of any litigant in the insurance rate litigation mentioned in evidence, or to coerce or compel obedience to any order, ruling, decree, or other purported exercise of jurisdiction by the three-judge Court in said litigation, but solely to punish for past acts allegedly contemptuous of said Court, and said three-judge Court, vested at most with jurisdiction (which defendant denies) for limited purposes in said original proceeding in equity, was without jurisdiction, power or authority so to punish.

24.

Because, if this proceeding could lawfully be maintained (which this defendant denies), jurisdiction therein was vested in the District Court for the Central Division of the Western District of Missouri, presided over by Honorable John C. Collet, District Judge, and not in the three-judge Court which purported to exercise jurisdiction in this cause.

25.

Because the information filed herein fails to state a cause of action against this defendant.

[fol. 101]

26.

Because the information filed in this proceeding shows upon its face that it is barred by the statute of limitations and that the alleged contemptuous acts asserted therein occurred more than three years next before the institution of said proceeding.

27.

Because the information shows that the alleged contemptuous acts sought to be charged against this defendant could not and did not constitute (a) contempt of court, (b) contempt of said three-judge Court, (c) contempt of said three-judge Court which said three-judge Court had power, jurisdiction or authority to punish, or (d) contempt of said Court, which said Court had power or jurisdiction or authority to punish by summary process or by any procedure other than indictment.

28.

Because the information shows upon its face that the three-judge Court was without jurisdiction in this action.

29.

Because the maintenance of this prosecution subjected this defendant to double jeopardy in violation of the Fifth Amendment to the Constitution of the United States, in that this defendant had heretofore been prosecuted for the alleged offense or offenses sought to be charged in this proceeding under the indictments mentioned in evidence (United States v. Thomas J. Pendergast, R. E. O'Malley and A. L. McCormack, No. 14912 and 14932, in

the District Court of the United States for the Western Division of the Western District of Missouri), which said indictments were duly consolidated for trial and a jury [fol. 102] duly empanelled and sworn, and the United States thereafter dismissed said indictments and this defendant was acquitted and discharged thereunder, thereby having been acquitted of the offense or offenses charged in this proceeding; and the three-judge Court erred in failing to so hold.

30.

Because this defendant has been prosecuted by the United States for the alleged offense or offenses sought to be charged in this proceeding under the indictments mentioned in evidence, which said indictments were consolidated for trial and a jury duly empanelled and sworn, and the United States thereafter dismissed said indictments and this defendant was acquitted and discharged thereunder, thereby having been acquitted of the offense or offenses sought to be charged in the information herein.

31.

Because under the evidence it appears that this prosecution was barred by the statute of limitations and that said prosecution was not instituted or the information filed within three years next after the occurrence of the alleged contemptuous acts, and the three-judge Court erred in failing to so find.

32.

Because the evidence on the trial before the three-judge Court failed to show (a) that defendant was guilty of the offense charged or sought to be charged; (b) that the defendant was guilty of contempt of court; (c) that the defendant was guilty of contempt of said three-judge Court; (d) that defendant was guilty of contempt of said three-judge Court, which said Court had power or authority to punish; (e) that defendant was guilty of con- [fol. 103] tempt of said three-judge Court, which said Court had power or authority to punish by summary process or by information or by procedure other than indictment; and the said three-judge Court erred in failing so to find.

33.

Because the acts charged against defendant and shown by the evidence did not constitute (a) contempt, (b) contempt of the three-judge Court, (c) contempt of the three-judge Court, which said Court had power or authority to punish, (d) contempt of said Court, which said Court had power or authority to punish in this proceeding.

34.

Because the evidence failed to show that this defendant was guilty of any act in law contemptuous of the three-judge Court; and said Court erred in failing to find the defendant not guilty.

35.

Because this defendant could not properly be charged with the act or acts of others in allegedly inducing action on the part of the three-judge Court, or expressly or by implication perpetrating a fraud upon said Court, when there was no evidence that this defendant was a party thereto or knew or anticipated that any action would or was to be thus induced or any fraud so perpetrated; and no conspiracy was charged in the information or shown by the evidence; and the three-judge Court erred in charging this defendant with or attributing to this defendant any act or acts of others in said particulars.

[fol. 104]

36.

Because the evidence failed to show this defendant guilty beyond a reasonable doubt; and the three-judge Court erred in its finding of guilt.

37.

Because the character of the Government's proof was such as to be insufficient to warrant a finding of guilt beyond reasonable doubt; and the three-judge Court erred in so finding.

38.

Because this prosecution was barred by reason of the agreement not to prosecute shown in the evidence, which said agreement was made between this defendant and the United States whereby and whereunder this defendant entered a plea of guilty mentioned in evidence in the

income tax case mentioned in evidence, and served the sentence thereupon imposed; and the three-judge Court erred in failing to find that said prosecution was barred by reason of said agreement, and in purporting to find that said prosecution was not barred by reason of said agreement.

39.

Because the members of the three-judge Court who purported to act in this cause were in fact disqualified in said proceeding, and in acting therein deprived this defendant of liberty and property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

[fol. 105]

40.

Because there was no evidence that this defendant was a party to the actual settlement agreed upon in the insurance rate case or to any act or acts of others in connection with such [settlment], or in the approval thereof; and the three-judge Court erred in making each finding made in connection therewith.

41.

Because there was no evidence in this cause that this defendant participated in any act or acts contemptuous of the three-judge Court, or was chargeable with any intent or design so to do.

42.

Because there was no evidence that this defendant was a party directly or indirectly to the compromise or settlement of the insurance rate litigation actually executed; and the three-judge Court erred in its findings in connection therewith.

43.

Because there was no evidence that this defendant was a party directly or indirectly to the stipulation of settlement mentioned in evidence; and said three-judge Court erred in its findings with reference thereto.

44.

Because there was no evidence that this defendant was a party directly or indirectly to any presentation of the stipulation of settlement mentioned in evidence, to the three-judge Court for its approval (if there was evidence of such presentation, which [de-] defendant denies), or to [fol 106] the motion for decree mentioned in evidence, or to any action taken to obtain the approval of said Court to said stipulation, or to induce any action on the part of said Court with reference thereto (if there is evidence of any such action, which defendant denies); and the three-judge Court erred in its findings in connection therewith.

45.

Because there was no evidence that there was any agreement between the defendants herein and Charles R. Street or between this defendant and any of the other defendants to the effect that they or any of them would keep the alleged transactions between them unknown to, or concealed from the said three-judge Court, or that by affirmative acts of concealment or silence they or any of them would prevent said Court from obtaining knowledge or information with reference thereto; and the evidence of the Government in the trial of said cause was affirmatively to the contrary; and that by reason thereof the Government cannot rely upon any inference or presumption with reference to any such alleged agreement; and the Government is entitled to no such inference or presumption for the further reason that the evidence was undisputed that this defendant was not a party to any such agreement of any kind or character; and by reason of the facts aforesaid the three-judge Court erred in making its finding of guilt and in finding the existence of such an agreement, and in making each and all of its findings in connection with such alleged agreements.

46.

Because there was no evidence of any concealment by A. L. McCormack before the United States Grand Jury of any facts relating to the settlement of the insurance [fol. 107] rate litigation mentioned in evidence and there was no evidence that any such alleged concealment was in furtherance of, or pursuant to any agreement whatsoever, and particularly to any agreement to which this

defendant was ever a party; and the evidence of the Government affirmatively disproved any such contention; and said alleged concealment or perjury could not bind this defendant or be competent against him or constitute the basis for any finding against him, and that by reason thereof the three-judge Court erred in failing to find the defendant not guilty, and in failing to find that this action was barred by the statute of limitations; and further erred in making each and every finding which was made by said Court in connection with said alleged Grand Jury testimony.

47.

Because there was no evidence that any alleged communication between the defendant R. E. O'Malley and defendant A. L. McCormack during the course of the grand jury inquiry mentioned in evidence was at the instance or request of this defendant, or pursuant to, or in furtherance of any agreement to which this defendant was a party; and the three-judge Court erred in making its finding of guilt and in failing to hold that this action was barred by the statute of limitations; and erred because said alleged communication could not in law be binding upon or competent against this defendant and could not in law constitute the basis of any finding against this defendant; and further erred in the making of each finding made in connection with said alleged communication or communications.

48.

Because there was not sufficient evidence to warrant a [fol. 108] finding of guilt against this defendant; and the three-judge Court erred in making such finding.

49.

Because there was no evidence sufficient to establish the offense charged or sought to be charged; and the three-judge Court erred in connection with each and every finding made in connection therewith.

50.

Because there was no evidence sufficient to establish that this defendant was a party to any act contemptuous of the three-judge Court; and the three-judge Court erred in making its finding of guilt.

51.

Because the evidence of the Government, binding upon the Government, affirmatively established the non-participation of this defendant in any act allegedly contemptuous of the three-judge Court; and the three-judge Court erred in failing to so find.

52.

Because there was no evidence sufficient to establish the necessary elements and ingredients of the offense sought to be charged; and the three-judge Court erred in making its finding of guilt.

53.

Because there was no evidence sufficient to establish any offense on the part of this defendant committed within the jurisdiction of the three-judge Court; and the three-judge Court erred in making its finding of guilt for said reason.

54.

Because there was no evidence sufficient to establish [fol. 109] criminal intent on the part of this defendant, and the three-judge Court erred in failing to so find.

55.

Because there was no evidence sufficient to establish contemptuous intent upon the part of this defendant; and the three-judge Court erred in its finding of guilt.

56.

Because there was no evidence sufficient to establish that this defendant was guilty of misbehavior in the presence of the three-judge Court, or so near thereto as to obstruct the administration of justice; and the three-judge Court erred in finding this defendant guilty.

57.

Because the three-judge Court erred in overruling and denying and failing to sustain the motion of this defendant to abate and quash the information filed in said Court, and to withdraw the rule to show cause for each and all of the reasons therein appearing.

58.

Because the three-judge Court erred in overruling and denying, and in failing to sustain the motion of this defendant at the close of the evidence of the United States to declare this defendant not guilty and to dismiss this proceeding, for each and all of the reasons therein appearing, and for each and all of the grounds therein stated.

[fol. 110]

59.

Because the three-judge Court erred in overruling and denying, and failing and refusing to sustain the motion of this defendant at the close of all the evidence to declare this defendant not guilty, and to dismiss this proceeding, for each and all of the reasons contained in said motion.

60.

Because the three-judge Court erred in admitting and receiving, over the objection and exception of this defendant, incompetent, irrelevant and immaterial evidence.

61.

Because the three-judge Court erred in excluding, over the exceptions of this defendant, competent, material and relevant evidence duly offered by this defendant.

62.

Because the three-judge Court erred in overruling and in failing and refusing to sustain motions to strike incompetent, irrelevant and immaterial evidence, which said motions were duly made by this defendant.

63.

Because the three-judge Court erred in overruling, and in failing and refusing to sustain motions duly made by this defendant to limit and restrict the effect of purported evidence.

64.

Because the findings, opinions and judgment of the three-judge Court are against the law and the evidence.

[fol. 111] 65.

Because the findings, opinions and judgment of the Court, and each part thereof, are unsupported by substantial evidence.

66.

Because the findings, opinions and judgment of the three-judge Court are against the greater weight of the evidence.

67.

Because the three-judge Court erred in failing and refusing to make each of the findings of fact duly requested by this defendant.

68.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

1. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, discussed with anyone or had any connection with or anything to do with the attempted settlement of the so-called insurance rate litigation.

69.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

2. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, had any knowledge of or anything to do with the agreement of settlement of the so-called insurance rate litigation.

[fol. 112] 70.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

3. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, had anything to do with or any knowledge of the motion for decree filed in the three-judge Court.

71.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

4. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, knew that cases involving the so-called insurance rate litigation were pending in the three-judge Court.

72.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

5. The Court finds that the defendant, Thomas J. Pendergast, was never in the presence of said three-judge Court.

73.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

6. The Court finds that the defendant, Thomas J. Pendergast, was never in the presence of the three-judge Court in connection with the so-called insurance rate [fol. 113] litigation or the proposed settlement thereof.

74.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

7. The Court finds that there is no evidence that the defendant Thomas J. Pendergast, knew of or had anything to do with the application for an order, or the issuance thereof by the three-judge Court, in said insurance rate litigation, or in connection with the distribution of the impounded funds.

75.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

8. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, received any money

from one Charles R. Street, or from anyone else, in connection with said insurance rate matter or litigation after October, 1936.

76.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

9. The Court finds that the decree providing for the dismissal of said insurance rate litigation and the distribution of the impounded funds was made on February 1st, 1936.

[fol. 114]

77.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

10. The Court finds that there is no evidence or proof from which a presumption may arise that the defendant, Thomas J. Pendergast knew of the terms of the proposed settlement of said insurance rate litigation.

78.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

11. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, was guilty of misbehavior in the presence of the Court that interfered with the order or decorum of said Court or interfered with the business or proceedings thereof.

79.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

12. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, was guilty of misbehavior in the presence of the Court or so near thereto as to obstruct the administration of justice.

80.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

[fol. 115] 13. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, committed any act of contempt of said three-judge Court.

81.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

14. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, committed any act of contempt of said three-judge Court within three years of the filing of the information herein.

82.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

15. The Court finds that there is no evidence showing or tending to show that the defendant, Thomas J. Pendergast, bribed the defendant, R. E. O'Malley in connection with said insurance rate litigation or the settlement or disposition thereof.

83.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

16. The Court finds that there is no evidence to sustain the following allegation of the information: "At all times hereinbefore mentioned, the defendants, and each of them, agreed with and between each other that they [fol. 116] would keep all of the transactions hereinbefore enumerated between Charles R. Street, T. J. Pendergast R. E. O'Malley and A. L. McCormack unknown to and concealed from this Honorable Court and that, by affirmative acts of concealment and silence, they would prevent the Court from having any knowledge or any information whatever concerning the fraudulent and corrupt trans-

actions between Charles R. Street and the defendants, T. J. Pendergast, R. E. O'Malley and A. L. McCormack, and that it was their design, purpose and intent, by means aforesaid and by affirmative acts of concealment, to induce and procure a decree of this Honorable Court, and to have the same continued in force, distributing the impounded monies in accordance with the compromise agreed upon at the conference in the Muehlebach Hotel in Kansas City, Missouri, hereinbefore referred to".

84.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

17. The Court finds that the evidence given by A. L. McCormack before the Federal Grand Jury had no connection in any way with the proposed settlement or settlement of the insurance rate litigation or the alleged connection of the defendants therewith.

85.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

[fol. 117] 18. The Court finds that, under all the evidence in the case, the defendant, Thomas J. Pendergast, did not commit a contempt of this Court.

86.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

19. The Court finds that there is no evidence that this defendant, Thomas J. Pendergast, was a party, directly or indirectly, to the compromise and settlement of the insurance rate litigation.

87.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

20. The Court finds that there is no evidence that this defendant, Thomas J. Pendergast, was a party, directly or

indirectly, to the stipulation of settlement aforesaid filed in this Court.

88.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

21. The Court finds that there is no evidence that this defendant, Thomas J. Pendergast, was a party, directly or indirectly, to the presentation of such stipulation of settlement to this Court for its approval, or to the motion for decree therein filed, or to any action taken to obtain the approval of this Court, or to induce the action of this Court [fol. 118] with reference thereto.

89.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

22. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, knew or had any notice that the proposed settlement would be presented to this Court for its approval or that this Court would act thereon and that the said Thomas J. Pendergast cannot be charged with such notice for the reason that this Court was without jurisdiction or authority to act in such matter.

90.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

23. The Court finds, from the evidence, that the maintenance of this prosecution subjects the defendant, Thomas J. Pendergast, to double jeopardy in violation of the Fifth Amendment to the Constitution of the United States, in that this defendant has heretofore been prosecuted for the alleged offense or offenses sought to be charged in this proceeding under the indictments mentioned in evidence. The said indictments were duly consolidated for trial; a jury was duly empanelled and sworn and the United States thereafter dismissed such indictments and this defendant was acquitted and discharged thereunder; that he has been and is thereby acquitted of

the offense or offenses now sought to be charged herein; that the facts and charges set forth in said indictments [fol. 119] were identical with the facts and charges set forth in the information herein; and that the identical evidence necessary to convict under said indictments would be necessary to convict under the information herein.

91.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

24. The Court finds that the allegations in the Bills, original, amended and supplemental, filed by the insurance companies in the insurance rate litigation purported to attack the constitutionality of the Missouri Insurance Statutes; that said allegations were wholly without foundation, at most colorable, and that said allegations were subsequently abandoned and said litigation proceeded solely upon the question of the alleged confiscatory character of the orders of the Superintendent of Insurance and that this Court had no jurisdiction to entertain or pass upon said matter and no jurisdiction to collect or distribute the impounded funds or to enter any order approving or recognizing the settlement of said litigation.

92.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

25. The Court finds that, under the evidence, it had no jurisdiction to entertain the insurance rate litigation.

[fol. 120] 93.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

26. The Court finds that, under the evidence, it has no jurisdiction to entertain the proceedings herein or to try this defendant, Thomas J. Pendergast, for contempt.

94.

Because the three-judge Court erred in failing and refusing to declare this defendant not guilty for each of the

reasons specified in the motion of this defendant filed at the close of all the evidence, to declare this defendant not guilty and to dismiss the proceedings.

95.

Because the three-judge Court erred in making and entering its first finding of fact (which said finding is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside the record of this cause, which said finding was made over the objection and exception of this defendant.

96.

Because the three-judge Court erred in making and entering its second finding of fact (which said finding of fact is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by any evidence and is predicated upon alleged matters and facts outside the record in this cause; and for the further reason that it con-[fol. 121] tains broad and sweeping conclusions of law not predicated upon any evidence in the cause, which said finding was made over the objection and exception of this defendant.

97.

Because the three-judge Court erred in making and entering, over the objection and exception of this defendant, its third finding of fact (which said finding is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence and is predicated upon alleged matters and facts outside of the record in this cause; and for the further reason that it contains broad and sweeping conclusions of law not predicated upon any evidence in the cause.

98.

Because the three-judge Court erred in making and entering its third finding of fact for the reason that said finding of fact purports to find that this defendant and the other defendants entered into a conspiracy to pre-

sent to the three-judge Court in open court a purportedly fake settlement and to grossly deceive said Court by the alleged lying, false and fraudulent representations allegedly made in open court at the instance of defendant, which said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, or any evidence, and is predicated upon alleged matters and facts outside the record in this cause, and contains broad and general conclusions of law not [fol. 122] predicated upon any evidence in this cause, and was made over the objection and exception of this defendant.

99.

Because the three-judge Court erred in making and entering, over the objection and exception of this defendant, its fourth finding of fact (which said finding is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside the record in this cause; and for the further reason that said finding contains broad and general conclusions of law not predicated upon any evidence in this cause.

100.

Because the three-judge Court erred in making, over the objection and exception of this defendant, each and every finding of fact made by said Court, whether made in said formal findings of fact or elsewhere in said opinions, or made in its judgment of conviction for the reason that each of said findings is contrary to the evidence, is contrary to the greater weight of the evidence, is unsupported by substantial evidence, is predicated upon alleged matters and facts outside the record in the cause; and for the reason that each of said findings contains erroneous conclusions of law, not predicated upon any evidence in the cause.

101.

Because the three-judge Court erred in each and all of its conclusions of law.

[fol. 123] 102.

Because the three-judge Court erred in holding in its

opinions that it possessed jurisdiction to entertain this proceeding in criminal contempt.

103.

Because the three-judge Court erred in its opinions, findings and judgment of conviction that it possessed jurisdiction to punish for the alleged criminal contempt sought to be charged in the information herein.

104.

Because the three-judge Court erred in holding in its findings, opinions and judgment that any acts of this defendant constituted contempt of said District Court.

105.

Because the three-judge Court erred in holding that any acts of this defendant shown by the evidence constituted contempt of said Court, punishable by said Court in this proceeding.

106.

Because the three-judge Court erred in its findings, opinions and judgment that this proceeding was incidental or ancillary to the so-called insurance rate litigation cases, and in failing to find that this proceeding was an independent proceeding for prosecution for criminal contempt.

107.

Because the three-judge Court erred in holding that this proceeding entitled United States of America vs. Thomas J. Pendergast, et al., No. 5040, an action in criminal [fol. 124] contempt, was incidental or ancillary to the so-called insurance rate litigation which was a proceeding in equity.

108.

Because the three-judge Court erred in failing and refusing to hold that said Court (even if lawfully convened) was without jurisdiction to entertain, hear or determine a prosecution for criminal contempt initiated on information on the part of the United States against this defendant.

109.

Because the three-judge Court erred in its opinion in this cause in purporting to find in the first footnote to said opinion that this action was a proceeding incidental to American Insurance Co., et al., vs. Thompson, In Equity No. 270, when in fact this proceeding in contempt entitled United States of America vs. Thomas J. Pendergast, et al., was a separate, independent criminal proceeding between the United States of America, plaintiff, and Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, defendants, and was numbered 5040, said number being a number assigned to this cause on the criminal docket of the Central Division of the District Court of the United States for the Western District of Missouri, presided over by the Honorable John C. Collet, District Judge.

110.

Because the three-judge Court erred in its opinion in holding that bribery was committed by this defendant or any of these defendants, or that political influence was brought to bear by the payment to this defendant of $440,000 for the reason that said purported finding and said [fol. 125] statement is unsupported by any evidence in the record in this cause, and is contrary to the evidence.

111.

Because the three-judge Court erred in finding in its opinion that these defendants, allegedly conspirators, committed acts in open court in the presence and face of the three-judge Court grossly to deceive and hoodwink the Judges constituting said Court, said finding being unsupported by any evidence in the record in this cause, and contrary to the evidence; and if said finding was published in said opinion as a conclusion of law, said conclusion is erroneous and not predicated upon any evidence in the record.

112.

Because the three-judge Court erred in holding, finding and concluding in its opinion that this defendant or these defendants "prostituted the Court to their venal purposes and exposed its Judges to the possibility of disgrace and to certain humiliation", said finding, holding and conclusion being unsupported by any evidence in the record of

this cause and contrary to any evidence in the record of this cause.

113.

Because the three-judge Court erred in finding, holding and concluding that these defendants never denied that they were guilty of the alleged misbehavior, and in purporting to predicate a finding of guilt upon said alleged absence of a denial for the reason that said finding is not supported by the evidence, is contrary to the evidence and the pleadings in this cause, and ignores the issues, [fol. 126] and deprives this defendant of rights guaranteed to him by Article V of the amendments to the Constitution of the United States, which Article Provides in part:

"No person shall be * * * compelled in any criminal case to be a witness against himself * * * .

"No person shall be deprived of life, liberty or property without due process of law."

in that the finding of guilt in said cause is based upon the failure of this defendant to testify in said cause.

114.

Because the three-judge Court erred in finding, holding and concluding in its opinion that this defendant and other defendants "stood on their technicalities", and erred in finding these defendants guilty of contempt of said Court on said ground, said finding, holding and conclusion being in violation of this defendant's constitutional right guaranteed to him by Article V of the amendments to the Constitution of the United States, which, in part, provides as follows:

"No person shall be * * * compelled in any criminal case to be a witness against himself * * *.

"No person shall be deprived of life, liberty or property without due process of law."

in that the finding of guilt in said cause is based upon the failure of this defendant to testify in said cause.

115.

Because the three-judge Court erred in making a purported finding in a footnote to its opinion as follows:

"The whole history of the criminal cases which resulted in the imposition of sentences on Pendergast and

O'Malley for attempted evasion of income taxes, including much which throws light upon the background of [fol. 127] the present proceeding in contempt, is set out in United States vs. Pendergast and O'Malley, 28 Fed. Supp. 601"

for the reason that said purported finding is not based upon any evidence in this cause, is outside the record, and attempts to incorporate into this proceeding matters outside the record.

116.

Because the three-judge Court erred in holding, finding and concluding in its opinion that this defendant confessed any alleged misbehavior or that this defendant had as well confess any alleged misbehavior; said finding being unsupported by any evidence in the record, and contrary to any evidence in the record; and in basing its opinion of guilt upon said finding, the three-judge Court thereby deprived defendant of his life and liberty without due process of law in violation of Article V of the amendments to the Constitution of the United States of America, which said Article provides in part as follows:

"No person shall be * * * compelled in any criminal case to be a witness against himself * * *.

"No person shall be deprived of life, liberty or property without due process of law."

in that the finding of guilt in said cause is based upon the failure of this defendant to testify in said cause.

117.

Because the three-judge Court erred in erroneously construing the case of Nye and Mayers vs. United States of America, decided by the Supreme Court of the United States on April 10, 1941 and reported in 85 L. Ed. 733, and in drawing unreasonable and unwarranted inferences therefrom, and in holding that said decision was not ap- [fol. 128] plicable to this proceeding.

118.

Because the three-judge Court erred in finding, holding and concluding that this defendant and the other defendants "sent their messengers (their innocent and unsuspecting messengers) to the very courtroom and into open

court", said finding being unsupported by any evidence in the record in this cause and contrary to the evidence in the record in this cause.

119.

Because the three-judge Court erred in finding, holding and concluding in its opinion that the alleged "misbehavior of these defendants was committed where it took effect and where it was intended to take effect"; said finding, holding and conclusion being unsupported by any evidence in the record in this proceeding, and contrary to any evidence in the record in this proceeding.

120.

Because the three-judge Court erred in its opinion in failing and refusing to consider the contention of this defendant that a three-judge court had no jurisdiction, power or authority to entertain this proceeding in criminal contempt.

121.

Because the three-judge Court erred in finding, holding and concluding in its opinion that the alleged "whole transaction was for the express purpose of effecting a settlement of the insurance litigation"; said finding, holding and conclusion being unsupported by any evidence in the record in this cause and contrary to the evidence [fol. 129] in the record in this cause.

122.

Because the three-judge Court erred in its deduction that the facts allegedly proved that there was a conspiracy between Street, O'Malley, McCormack and this defendant to obtain decrees disposing of the impounded fund, for the reason that said purported finding and deduction is not within the pleadings, unsupported by the evidence, and contrary to the evidence.

123.

Because the three-judge Court erred in its opinion in this cause in holding that the prosecution herein was not barred by the statute of limitations, for each and all of the following reasons: (1) because it appears from the face of the information herein that said prosecution

against this defendant is barred by the statute of limitations; (2) because under the evidence in the cause it appears that said prosecution is barred by the statute of limitations; (3) because each and all of the three-judge Court's findings with reference to the statute of limitations are unsupported by the evidence and contrary to the undisputed evidence; (4) because it affirmatively appears from the evidence that the theory upon which the three-judge Court held that the statute of limitations did not apply was erroneous in law and unsupported by the evidence..

124.

Because the three-judge Court erred in holding, finding and concluding that the alleged deception of this defendant and the other defendants continued the alleged misbehavior far beyond the actual entry of the decree in the insurance rate litigation, for the reason that said finding [fol. 130] is unsupported by the evidence and is contrary to the undisputed evidence, and is erroneous in law.

125.

Because the three-judge Court erred in finding in its opinion that this defendant and the other defendants committed particular acts of "supplemental deception", said finding being unsupported by any evidence in the record in this cause and contrary to the evidence.

126.

Because the three-judge Court erred in its purported findings in its opinion to the effect that McCormack committed perjury before the Grand Jury, and that said alleged perjury was committed as a result of an agreement between the defendants and was an affirmative act of deception, for the reason that said purported finding is unsupported by the evidence and is an erroneous conclusion of law which is contrary to the evidence.

127.

Because the three-judge Court erred in finding that it could be reasonably inferred that this defendant and the other defendants had entered into an agreement with reference to McCormack's testimony before said Grand Jury, for the reason that said purported inference is unwar-

ranted by the evidence, is contrary to the evidence, and was affirmatively destroyed by the undisputed and uncontradicted evidence offered on behalf of the Government.

128.

Because the three-judge Court erred in its opinion in [fol. 131] holding, concluding and finding that the alleged acts of the defendant were calculated to stir the Court's resentment and anger, and that the stirring of the Court's resentment and anger was the actual offense allegedly committed by this defendant and the other defendants, for the reason that said finding is erroneous in law, unsupported by the evidence, and contrary to the evidence.

129.

Because the three-judge Court erred in finding, holding and concluding that "There is no statute of limitations applicable to contempt committed 'in the presence of the Court'.", for the reason that said statement is an erroneous conclusion of law, and for the further reason that it affirmatively appears from the evidence in this cause that there was no contempt committed in the presence of said Court.

130.

Because the three-judge Court erred in finding, holding and concluding in its opinion that the statute of limitations did not begin to run in this case until the alleged deception practiced by the defendants "ceased to have effect, nor until the last alleged affirmative set fortifying the alleged deception was committed by the alleged conspirators, or any of them, nor until the essence of the alleged contempt became an active principle by the discovery of the truth", for the reason that said conclusion is erroneous in law and unsupported by any evidence in the record, and unwarranted by the evidence in the record.

[fol. 132] 131.

Because the three-judge Court erred in its opinion in holding that this defendant had not been subjected to double jeopardy by reason of the previous prosecution and acquittal of this defendant in Causes No. 14912 and 14932

in the District Court of the United States entitled United States of America, plaintiff, vs. Thomas J. Pendergast, R. E. O'Malley and A. L. McCormack, defendants, for the reason that said purported finding that the maintenance of this prosecution did not constitute double jeopardy is contrary to the undisputed evidence, and the conclusions of the Court in connection therewith are unsupported by the evidence, erroneous in law, and contrary to the record entries, verdicts and judgment in the causes hereinabove mentioned.

132.

Because the three-judge Court erred in its opinion in purporting to find that the agreement between the United States of America and this defendant, made and entered into prior to the entering of the plea of guilty in the income tax case mentioned in evidence, did not entitle the defendant to a dismissal of this cause, for the reason that said finding is contrary to the terms and provisions of said agreement, contrary to the undisputed evidence in the cause, contrary to the judicial admissions made by the Government in the trial of this cause in open court, and contrary to the stipulations shown in the record in this cause.

133.

Because the three-judge Court erred in its opinion by finding, holding and concluding that the United States District Attorney only made known the agreement not [fol. 133] to further prosecute this defendant at the instance and request of counsel for this defendant and the other defendants, and until after this defendant and defendant O'Malley had been sentenced, and the term had passed, and after sentence could not be changed, and in purportedly finding that said United States District Attorney did not intend or contemplate that said agreement would extend to this proceeding in contempt, for the reason that said finding is contrary to the undisputed evidence in the cause and is unsupported by any evidence, and constitutes an unwarranted purported interpretation of the agreement shown by the evidence.

134.

Because the three-judge Court erred in finding, holding and concluding that this defendant and the other defend-

ants "did everything conceivably possible to be done to avoid trial" under indictments returned in Causes entitled United States of America, plaintiff, vs. Thomas J. Pendergast, R. E. O'Malley and A. L. McCormack, defendants, No. 14912 and 14932, in the District Court of the United States for the Western Division of the Western District of Missouri, for the reason that said finding is unsupported by any evidence in the record, and contrary to the evidence.

135.

Because the three-judge Court erred in failing and refusing to give effect to the agreement mentioned in evidence between the United States, acting through the District Attorney, and this defendant, either by abating this prosecution or staying proceedings herein, or sentence herein, pending an application to the Executive for clemency and the action of the Executive thereon.

[fol. 134]

136.

Because the three-judge Court erred in overruling the motion for new trial filed herein by defendant Thomas J. Pendergast and erred in failing to sustain said motion for new trial upon each and all of the grounds therein contained.

137.

Because the three-judge Court erred in the following rulings (which said rulings were made and entered by the District Court on June 7, 1941):

1. The Court erred in admitting over the objections and exceptions of defendant, and in refusing to strike on the motion of defendant, and in refusing to limit on the motion of defendant, each of the following items of evidence:

(a) Testimony of McCormack to the effect that in St. Louis he had a conversation with defendant O'Malley wherein O'Malley allegedly asked if the companies would be interested in settling the rate litigation, and suggested a meeting between Street and Pendergast, as hearsay and not binding on this defendant.

(b) Testimony of McCormack to the effect that he advised Street of the St. Louis conversation and Street

agreed to talk to Pendergast, as hearsay and not binding on this defendant.

(c) Testimony of McCormack that O'Malley advised him that Pendergast would be in Chicago on a given date and he so advised Street.

(d) Testimony of McCormack that he notified Street of Pendergast's visit in Chicago, that Street asked him if he would take money to Pendergast, that he conversed with O'Malley in St. Louis and that O'Malley asked him for his share, claimed conversations between McCormack and O'Malley about $22,500.00 and $40,000.00, and $10,000.00 to be delivered at Menorah hospital, that O'Malley asked him to leave his name out before the Grand Jury, as hearsay and not binding on this defendant, this assignment being directed to each of said conversations.

2. The Court erred in overruling defendant's objection to judicial noticing of proceedings in the rate controversy and to the taking of such notice.

3. The Court erred in directing the Clerk to alter the numbering and designation of this cause.

[fol. 135] 138

Because the three-judge Court erred in its opinion and in the conclusion thereof in finding this defendant guilty, and in its judgment entered herein for each and all of the reasons hereinabove stated, which said reasons are here reassigned with the same force and effect as if again set out herein.

WHEREFORE, by reason whereof and on account of the errors above assigned and cited; and of which complaint is herein made, the defendant Thomas J. Pendergast prays that the findings, orders, judgment and sentence of the three-judge Court entered against said defendant herein be reversed, set aside and for naught held.

Dated this 7th day of June, 1941.

R. R. Brewster
John G. Madden
James E. Burke
Attorneys for Defendant
Thomas J. Pendergast.

Filed in the United States District Court June 7, 1941

[fol. 136] (Notice of Notice of Appeal of Defendant, Thomas J. Pendergast, and Acknowledgment of Service.)

In the District Court of the United States for the Central Division of the Western District of Missouri. United States of America, Plaintiff, vs. Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack, Defendants. No. 5040 a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

Before KIMBROUGH STONE, Circuit Judge, ALBERT L. REEVES and MERRILL E. OTIS, District Judges.

TO THE UNITED STATES OF AMERICA, THE ABOVE NAMED PLAINTIFF, OR MAURICE M. MILLIGAN, United States District Attorney for the Western District of Missouri:

You, and each of you, are hereby notified that Thomas J. Pendergast, the above named defendant, has appealed to the United States Circuit Court of Appeals for the Eighth Circuit, from the judgment of conviction rendered in this cause, and from the sentence and punishment imposed by the aforesaid court pursuant thereto; as well as from all such other actions, rulings and orders of the aforesaid court, in this cause, and of which complaint is specifically made in separate motions for a new trial and assignments of error, in this cause; and you and each of you are hereby notified that said appeal is made and rendered returnable within 40 days hereafter in the United States Circuit Court of Appeals for the Eighth Cir-

[fol. 137] cuit, in the City of Saint Louis, Missouri.

Thomas J. Pendergast
Defendant.

R. R. Brewster
John G. Madden
James E. Burke
Attorneys for Thomas J. Pendergast.

I hereby, this June 7, 1941, acknowledge service of the above and foregoing Notice of Appeal; and further ac-

knowledge receipt of copy thereof, as well as a copy of the motion for a new trial, to which reference is made therein.

Richard K. Phelps
For the United States District Attorney for the Western District of Missouri.

Filed in the United States District Court June 7, 1941

(Duplicate Notice of Appeal of Defendant, Thomas J. Pendergast filed in Appellate Court.)

The Duplicate Notice of Appeal of the defendant, Thomas J. Pendergast, was filed in the United States Circuit Court of Appeals on June 27, 1941, but same is omitted from the printed record at this place to avoid duplication inasmuch as the Notice of Appeal on behalf of the Defendant Thomas J. Pendergast which was filed in the District Court heretofore appears in this printed record at folio page 94.

[fol. 138] (Cost Bond on Appeal of Thomas J. Pendergast.)

KNOW ALL MEN BY THESE PRESENTS, that we, Thomas J. Pendergast, as principal and NATIONAL SURETY CORPORATION, as surety, are held and firmly bound unto the United States of America, in the full and just sum of Two hundred fifty dollars ($250.00) for the payment of which, well and truly to be made, we bind ourselves, our executors, administrators, successors, assigns and representatives, jointly and severally by these presents.

The condition of said bond is such that,

WHEREAS, lately, at a term of the statutory District Court of the United States for the Central Division of the Western District of Missouri, in a suit pending in said

court wherein United States of America was plaintiff and Thomas J. Pendergast, Robert Emmett O'Malley and A: L. McCormack were defendants, a judgment of conviction and sentence was rendered against defendant Thomas J. Pendergast on June 7th, 1941, from which said defendant has taken an appeal to the United States Circuit Court of Appeals for the Eighth Circuit;

[fol. 139] Now Therefore, if the said Thomas J. Pendergast shall prosecute his appeal with effect and, if he fails to make his plea good, shall pay all costs which may accrue or be assessed against him by said Court or pursuant to order of said Court on account of such appeal, then the above obligation to be void, otherwise to remain in full force and effect.

Dated at Kansas City, Missouri, this 7th day of June, 1941.

Thomas J. Pendergast
Principal
National Surety Corporation
By G. B. Howland (Seal)
Attorney-in-fact
Surety

Approved as to Form.
Richard K. Phelps
Asst. United States District Attorney.

Approved:

Circuit Judge
Albert L. Reeves
District Judge

District Judge

Judges Before Whom Defendant was Tried.

Filed in the United States District Court June 7, 1941

[fol. 140] (Citation on Appeal of Defendant, Thomas J. Pendergast, and Acknowledgment of Service.)

In the District Court of the United States for the Central Division of the Western District of Missouri. United States of America, Plaintiff, vs. Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, Defendants. No. 5040 a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

Before Kimbrough Stone, Circuit Judge, Albert L. Reeves, and Merrill E. Otis, District Judges.

TO UNITED STATES OF AMERICA AND MAURICE M. MILLIGAN, UNITED STATES DISTRICT ATTORNEY, -- GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the city of St. Louis, Missouri, forty days from and after the date this citation bears, pursuant to an appeal filed with the Clerk of the District Court of the United States for the Central Division of the Western District of Missouri wherein Thomas J. Pendergast is appellant and the United States of America is appellee, to show cause if any there be why the judgment and conviction rendered against the said appellant, as in said appeal mentioned, should not be corrected and reversed, and why speedy justice should not be done the parties in that behalf.

WITNESS, the Honorable Kimbrough Stone, Judge of the United States Circuit Court of Appeals for the Eighth Circuit, the Honorable Albert L. Reeves, United States District Judge and the Honorable Merrill E. Otis, United States District Judge, this 7th day of June, in the year of [fol. 141] our Lord One Thousand Nine Hundred and Forty-one.

Kimbrough Stone
Circuit Judge.

Albert L. Reeves
District Judge.

Merrill E. Otis
District Judge.

We hereby acknowledge due service of the within citation together with copies of Petition for Appeal, Assignment of Errors, Order Allowing Appeal and granting supersedeas, and bonds in connection with said appeal, this 7th day of June, 1941.

M. M. Milligan
United States District Attorney
By Richard K. Phelps
Assistant United States District Attorney.

Filed in the United States District Court June 7, 1941

[fol. 142] (Petition for Appeal by Defendant, Thomas J. Pendergast.)

TO THE HONORABLE KIMBROUGH STONE, CIRCUIT JUDGE, ALBERT L. REEVES, DISTRICT JUDGE, AND MERRILL E. OTIS, DISTRICT JUDGE:

Comes now the defendant Thomas J. Pendergast in person and by attorneys, and respectfully shows that on June 7, 1941, a judgment of conviction for contempt was entered against your petitioner upon an information in contempt in said cause, and that upon said judgment a sentence was rendered against your petitioner on June 7, 1941.

That your petitioner is aggrieved by the finding and judgment of conviction and the sentence entered thereon, as aforesaid, and by the rulings of said Court and the proceedings had in the above-entitled cause, including the actions and rulings of the Court in overruling defendant Thomas J. Pendergast's motion to quash the information and to withdraw the rule to show cause, in overruling the demurrer of said defendant to said information, in overruling the motion of said defendant at the close of the evidence in said cause to declare the defendant not guilty and to dismiss the proceedings, and in overruling [fol. 143] this defendant's motion for new trial, and in the commission of the various errors set out in the assignments of error and grounds for appeal filed herein, and the said Thomas J. Pendergast petitions the Court

for an order allowing him to prosecute an appeal, and allow him an appeal, to the United States Circuit Court of Appeals for the Eighth Circuit under the laws of the United States in such cases made and provided. Your petitioner further asks said appeal, and does hereby appeal for a reversal of said judgment, for each and all of the reasons specified in the assignments of error filed herewith, said appeal being to the United States Circuit Court of Appeals for the Eighth Circuit.

WHEREFORE, the premises considered, your petitioner prays that an appeal be ordered and allowed from said judgment, finding and sentence, and every part thereof, to the United States Circuit Court of Appeals for the Eighth Circuit, for the reasons set forth in the assignments of error herein, and that said appeal be allowed your petitioner and made returnable according to law; that citation be issued as provided by law; that a transcript of the record, proceedings and exhibits upon which said judgment was based, duly authenticated, be sent to the said Circuit Court of Appeals under the rules of said court in such cases made and provided; and that your petitioner be granted a supersedeas and stay of proceedings pending the termination of said appeal, and that proper order relating to securities to be required of your petitioner be made.

R. R. Brewster
John G. Madden
James E. Burke
Attorneys for Defendant
Thomas J. Pendergast.

Filed in the United States District Court June 7, 1941

[fol. 144] (Assignments of Error of Defendant Thomas J. Pendergast.)

Comes now the defendant Thomas J. Pendergast, and in connection with, and as a part of his petition for appeal, assigns the following errors which he avers were committed by the three-judge Court in its rulings, orders, opinions, judgment and sentence in this cause and upon which this defendant relied in the prosecution of the appeal herewith petitioned for in said cause to set aside

and reverse the judgment, order and sentence heretofore rendered:

[fol. 145]

1.

Because the three-judge Court erred in failing to hold that under the pleadings, the law and the evidence, this defendant was not shown to be guilty of the offense sought to be charged in this proceeding.

2.

Because under the pleadings, the law and the evidence this defendant is entitled to judgment, and the three-judge Court erred in failing to render judgment on behalf of this defendant.

3.

Because the three-judge Court erred in failing to find the defendant not guilty of contempt of Court under the pleadings, the law and the evidence.

4.

Because the three-judge Court erred in not finding under the pleadings, the law and the evidence, that this defendant was not shown to be guilty of contempt which the three-judge Court had power or authority to punish.

5.

Because the three-judge Court was without jurisdiction to entertain, hear or determine this proceeding and erred in not so holding.

[fol. 146]

6.

Because the three-judge Court erred in assuming jurisdiction to entertain, hear or determine this proceeding in contempt, or to try or convict this defendant of the defense sought to be charged.

7.

Because the three-judge Court erred in assuming jurisdiction to punish this defendant for the alleged contempt sought to be charged.

8.

Because the three-judge Court was illegally convened

at the inception of the insurance rate litigation mentioned in evidence (American Insurance Co. vs. Joseph B. Thompson, Superintendent of Insurance for the State of Missouri, et al.; No. 270 In Equity, and companion cases bearing Docket Nos. 271 to 426, Incl.) and did not lawfully acquire jurisdiction therein.

9.

Because the three-judge Court was without jurisdiction to entertain, consider, approve or disapprove the purported settlement or stipulation of settlement of the insurance rate litigation mentioned in evidence, and erred in assuming, undertaking or entertaining such jurisdiction.

10.

Because the three-judge Court was without jurisdiction to disburse or supervise the disbursement of impounded funds mentioned in evidence.

[fol. 147]

11.

Because the purported settlement of the insurance rate litigation mentioned in evidence was a nullity and not susceptible of approval or enforcement by the three-judge Court, and the three-judge Court erred in holding that said matter was within its jurisdiction.

12.

Because, if the three-judge Court acquired jurisdiction of the insurance rate litigation mentioned in evidence (which this defendant denies) under the colorable averments of the bills filed, such jurisdiction was lost prior to the proceedings in said litigation relating to the purported settlement thereof; and that said three-judge Court thereafter had no power or authority under the law to act therein.

13.

Because, prior to the proceeding in the insurance rate litigation relating to the purported settlement thereof, the three-judge Court and the litigants in said insurance rate litigation recognized the constitutionality of the State statutes assailed in the bills in equity therein, and were proceeding solely upon the theory that the action of the

Superintendent of Insurance of the State of Missouri under constitutional statutes was confiscatory; as a result, any jurisdiction it may have theretofore acquired was thereupon lost and the three-judge Court erred in proceeding thereafter, and was acting contrary to the terms and provisions of the Statutes of the United States authorizing the calling of a three-judge Court.

[fol. 148]

14.

Because the three-judge Court under the statutes in such cases made and provided, could have acquired no jurisdiction in the insurance rate litigation mentioned in evidence other than to grant or deny injunctive relief sought on the ground of the unconstitutionality of a State statute or State statutes; and that in purporting to entertain, hear, consider, approve and enforce the purported settlement of said insurance rate litigation, in whole or in part, the three-judge Court was acting extrajurisdictionally and its action was a nullity and void; and the three-judge Court erred in continuing to assert jurisdiction thereafter.

15.

Because the bills in equity filed by the insurance companies in the insurance rate litigation mentioned in evidence failed to state a cause of action, were not petitions or bills to review the action of the Superintendent of Insurance complained of, did not justify or authorize injunctive relief or any relief by the three-judge Court, were insufficient to authorize the creation or formation of a three-judge Court, and said three-judge Court sought to be convened, acquired no lawful jurisdiction and said three-judge Court erred in asserting jurisdiction or proceeding in said causes.

16.

Because the three-judge Court erred in charging this defendant with notice of the terms of the purported settlement, or that said purported settlement would be reduced to a written agreement and presented to the three-judge Court for its approval, or that said three-judge Court [fol. 149] would act thereon, when such settlement was a nullity and when said three-judge Court was without jurisdiction or authority to act thereon.

17.

Because the three-judge Court erred in asserting jurisdiction to direct the disbursement of the impounded funds mentioned in evidence in accordance with the purported settlement of said insurance rate litigation, or in taking any action thereon.

18.

Because the three-judge Court at the time of the alleged contempt charged herein was not a lawfully constituted court or exercising any lawful or constitutional or statutory jurisdiction, and its proceedings were erroneous and extrajurisdictional.

19.

Because at the time of the institution of this proceeding the three-judge Court was not a lawfully constituted court or exercising any lawful or constitutional jurisdiction, and the three-judge Court erred in attempting to assert jurisdiction herein.

20.

Because the three-judge Court, convened as a court of limited statutory jurisdiction, was without authority or jurisdiction to entertain, hear or determine this proceeding.

21.

Because this proceeding was and is an independent action at law and not a part of the original proceeding in equity over which the three-judge Court was attempting [fol. 150] to assert jurisdiction; and said three-judge Court therefore was without jurisdiction herein.

22.

Because this proceeding is a prosecution for alleged criminal contempt and the three-judge Court is vested with no jurisdiction thereover.

23.

Because this proceeding was neither instituted nor maintained for the benefit of any litigant in the insurance rate litigation mentioned in evidence, or to coerce or compel obedience to any order, ruling, decree, or other pur-

ported exercise of jurisdiction by the three-judge Court in said litigation, but solely to punish for past acts allegedly contemptuous of said Court, and said three-judge Court, vested at most with jurisdiction (which defendant denies) for limited purposes in said original proceeding in equity, was without jurisdiction, power or authority so to punish.

24.

Because, if this proceeding could lawfully be maintained (which this defendant denies), jurisdiction therein was vested in the District Court for the Central Division of the Western District of Missouri, presided over by Honorable John C. Collet, District Judge, and not in the three-judge Court which purported to exercise jurisdiction in this cause.

25.

Because the information filed herein fails to state a cause of action against this defendant.

[fol. 151]

26.

Because the information filed in this proceeding shows upon its face that it is barred by the statute of limitations and that the alleged contemptuous acts asserted herein occurred more than three years next before the institution of said proceeding.

27.

Because the information shows that the alleged contemptuous acts sought to be charged against this defendant could not and did not constitute (a) contempt of court, (b) contempt of said three-judge Court, (c) contempt of said three-judge Court which said three-judge Court had power, jurisdiction or authority to punish, or (d) contempt of said Court, which said Court had power or jurisdiction or authority to punish by summary process or by any procedure other than indictment.

28.

Because the information shows upon its face that the three-judge Court was without jurisdiction in this action.

29.

Because the maintenance of this prosecution subjected this defendant to double jeopardy in violation of the Fifth Amendment to the Constitution of the United States, in that this defendant had heretofore been prosecuted for the alleged offense or offenses sought to be charged in this proceeding under the indictments mentioned in evidence (United States v. Thomas J. Pendergast, R. E. O'Malley and A. L. McCormack, No. 14912 and 14932, in the District Court of the United States for the Western Division of the Western District of Missouri), which said indictments were duly consolidated for trial and a jury [fol. 152] duly empanelled and sworn, and the United States thereafter dismissed said indictments and this defendant was acquitted and discharged thereunder, thereby having been acquitted of the offense or offenses charged in this proceeding; and the three-judge Court erred in failing to so hold.

30.

Because this defendant has been prosecuted by the United States for the alleged offense or offenses sought to be charged in this proceeding under the indictments mentioned in evidence, which said indictments were consolidated for trial and a jury duly empanelled and sworn, and the United States thereafter dismissed said indictments and this defendant was acquitted and discharged thereunder, thereby having been acquitted of the offense or offenses sought to be charged in the information herein.

31.

Because under the evidence it appears that this prosecution was barred by the statute of limitations and that said prosecution was not instituted or the information filed within three years next after the occurrence of the alleged contemptuous acts, and the three-judge Court erred in failing to so find.

32.

Because the evidence on the trial before the three-judge Court failed to show (a) that defendant was guilty of the offense charged or sought to be charged; (b) that the defendant was guilty of contempt of court; (c) that the defendant was guilty of contempt of said three-judge

Court; (d) that defendant was guilty of contempt of said three-judge Court, which said Court had power or authority to punish; (e) that defendant was guilty of con-
[fol. 153] tempt of said three-judge Court, which said Court had power or authority to punish by summary process or by information or by procedure other than in dictment; and the said three-judge Court erred in failing so to find.

33.

Because the acts charged against defendant and shown by the evidence did not constitute (a) contempt, (b) contempt of the three-judge Court, (c) contempt of the three-judge Court, which said Court had power or authority to punish, (d) contempt of said Court, which said Court had power or authority to punish in this proceeding.

34.

Because the evidence failed to show that this defendant was guilty of any act in law contemptuous of the three-judge Court; and said Court erred in failing to find the defendant not guilty.

35.

Because this defendant could not properly be charged with the act or acts of others in allegedly inducing action on the part of the three-judge Court, or expressly or by implication perpetrating a fraud upon said Court, when there was no evidence that this defendant was a party thereto or knew or anticipated that any action would or was to be thus induced or any fraud so perpetrated; and no conspiracy was charged in the information or shown by the evidence; and the three-judge Court erred in charging this defendant with or attributing to this defendant any act or acts of others in said particulars.

[fol. 154] 36.

Because the evidence failed to show this defendant guilty beyond a reasonable doubt; and the three-judge Court erred in its finding of guilt.

37.

Because the character of the Government's proof was such as to be insufficient to warrant a finding of guilt

beyond reasonable doubt; and the three-judge Court erred in so finding.

38.

Because this prosecution was barred by reason of the agreement not to prosecute shown in the evidence, which said agreement was made between this defendant and the United States whereby and whereunder this defendant entered a plea of guilty mentioned in evidence in the income tax case mentioned in evidence, and served the sentence thereupon imposed; and the three-judge Court erred in failing to find that said prosecution was barred by reason of said agreement, and in purporting to find that said prosecution was not barred by reason of said agreement.

39.

Because the members of the three-judge Court who purported to act in this cause were in fact disqualified in said proceeding, and in acting therein deprived this defendant of liberty and property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

[fol. 155]

40.

Because there was no evidence that this defendant was a party to the actual settlement agreed upon in the insurance rate case or to any act or acts of others in connection with such settlement, or in the approval thereof; and the three-judge Court erred in making each finding made in connection therewith.

41.

Because there was no evidence in this cause that this defendant participated in any act or acts contemptuous of the three-judge Court, or was chargeable with any intent or design so to do.

42.

Because there was no evidence that this defendant was a party directly or indirectly to the compromise or settlement of the insurance rate litigation actually executed; and the three-judge Court erred in its findings in connection therewith.

43.

Because, there was no evidence that this defendant was a party directly or indirectly to the stipulation of settlement mentioned in evidence; and said three-judge Court erred in its findings with reference thereto.

44.

Because there was no evidence that this defendant was a party directly or indirectly to any presentation of the stipulation of settlement mentioned in evidence, to the three-judge Court for its approval (if there was evidence of such presentation, which [de-] defendant denies), or to [fol. 156] the motion for decree mentioned in evidence, or to any action taken to obtain the approval of said Court to said stipulation, or to induce any action on the part of said Court with reference thereto (if there is evidence of any such action, which defendant denies); and the three-judge Court erred in its findings in connection therewith.

45.

Because there was no evidence that there was any agreement between the defendants herein and Charles R. Street or between this defendant and any of the other defendants to the effect that they or any of them would keep the alleged transactions between them unknown to, or concealed from the said three-judge Court, or that by affirmative acts of concealment or silence they or any of them would prevent said Court from obtaining knowledge or information with reference thereto; and the evidence of the Government in the trial of said cause was affirmatively to the contrary; and that by reason thereof the Government cannot rely upon any inference or presumption with reference to any such alleged agreement; and the Government is entitled to no such inference or presumption for the further reason that the evidence was undisputed that this defendant was not a party to any such agreement of any kind or character; and by reason of the facts aforesaid the three-judge Court erred in making its finding of guilt and in finding the existence of such an agreement, and in making each and all of its findings in connection with such alleged agreements.

46.

Because there was no evidence of any concealment by

A. L. McCormack before the United States Grand Jury of any facts relating to the settlement of the insurance [fol. 157] rate litigation mentioned in evidence and there was no evidence that any such alleged concealment was in furtherance of, or pursuant to any agreement whatsoever, and particularly to any agreement to which this defendant was ever a party; and the evidence of the Government affirmatively disproved any such contention; and said alleged concealment or perjury could not bind this defendant or be competent against him or constitute the basis for any finding against him; and that by reason thereof the three-judge Court erred in failing to find the defendant not guilty, and in failing to find that this action was barred by the statute of limitations; and further erred in making each and every finding which was made by said Court in connection with said alleged Grand Jury testimony.

47.

Because there was no evidence that any alleged communication between the defendant R. E. O'Malley and defendant A. L. McCormack during the course of the grand jury inquiry mentioned in evidence was at the instance or request of this defendant, or pursuant to, or in furtherance of any agreement to which this defendant was a party; and the three-judge Court erred in making its finding of guilt and in failing to hold that this action was barred by the statute of limitations; and erred because said alleged communication could not in law be binding upon or competent against this defendant and could not in law constitute the basis of any finding against this defendant; and further erred in the making of each finding made in connection with said alleged communication or communications.

48.

Because there was no sufficient evidence to warrant a [fol. 158] finding of guilt against this defendant; and the three-judge Court erred in making such finding.

49.

Because there was no evidence sufficient to establish the offense charged or sought to be charged; and the three-

judge Court erred in connection with each and every finding made in connection therewith.

50.

Because there was no evidence sufficient to establish that this defendant was a party to any act contemptuous of the three-judge Court; and the three-judge Court erred in making its finding or guilt.

51.

Because the evidence of the Government, binding upon the Government, affirmatively established the non-participation of this defendant in any act allegedly contemptuous of the three-judge Court; and the three-judge Court erred in failing to so find.

52.

Because there was no evidence sufficient to establish the necessary elements and ingredients of the offense sought to be charged; and the three-judge Court erred in making its finding of guilt.

53.

Because there was no evidence sufficient to establish any offense on the part of this defendant committed within the jurisdiction of the three-judge Court; and the three-judge Court erred in making its finding of guilt for said reason.

54.

Because there was no evidence sufficient to establish [fol. 159] criminal intent on the part of this defendant; and the three-judge Court erred in failing to so find.

55.

Because there was no evidence sufficient to establish contemptuous intent upon the part of this defendant; and the three-judge Court erred in its finding of guilt.

56.

Because there was no evidence sufficient to establish that this defendant was guilty of misbehavior in the presence of the three-judge Court, or so near thereto as to

obstruct the administration of justice; and the three-judge Court erred in finding this defendant guilty.

57.

Because the three-judge Court erred in overruling and denying and failing to sustain the motion of this defendant to abate and quash the information filed in said Court, and to withdraw the rule to show cause for each and all of the reasons therein appearing.

58.

Because the three-judge Court erred in overruling and denying, and in failing to sustain the motion of this defendant at the close of the evidence of the United States to declare this defendant not guilty and to dismiss this proceeding, for each and all of the reasons therein appearing, and for each and all of the grounds therein stated.

[fol. 160]

59.

Because the three-judge Court erred in overruling and denying, and failing and refusing to sustain the motion of this defendant at the close of all the evidence to declare this defendant not guilty, and to dismiss this proceeding, for each and all of the reasons contained in said motion.

60.

Because the three-judge Court erred in admitting and receiving, over the objection and exception of this defendant, incompetent, irrelevant and immaterial evidence.

61.

Because the three-judge Court erred in excluding, over the exceptions of this defendant, competent, material and relevant evidence duly offered by this defendant.

62.

Because the three-judge Court erred in overruling and in failing and refusing to sustain motions to strike incompetent, irrelevant and immaterial evidence, which said motions were duly made by this defendant.

63.

Because the three-judge Court erred in overruling, and in failing and refusing to sustain motions duly made by

this defendant to limit and restrict the effect of purported evidence.

64.

Because the findings, opinions and judgment of the three-judge Court are against the law and the evidence.

[fol. 161]

65.

Because the findings, opinions, and judgment of the Court, and each part thereof, are unsupported by substantial evidence.

66.

Because the findings, opinions and judgment of the three-judge Court are against the greater weight of the evidence.

67.

Because the three-judge Court erred in failing and refusing to make each of the findings of fact duly requested by this defendant.

68.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

1. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, discussed with anyone or had any connection with or anything to do w th the attempted settlement of the so-called insurance rate litigation.

69.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

2. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, had any knowledge of or anything to do with the agreement of settlement of the so-called insurance rate litigation.

[fol. 162] 70.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

3. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, had anything to do with or any knowledge of the motion for decree filed in the three-judge Court.

71.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

4. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, knew that cases involving the so-called insurance rate litigation were pending in the three-judge Court.

72.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant exepted):

5. The Court finds that the defendant, Thomas J. Pendergast, was never in the presence of said three-judge Court.

73.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

6. The Court finds that the defendant, Thomas J. Pendergast, was never in the presence of the three-judge Court in connection with the so-called insurance rate [fol. 163] litigation or the proposed settlement thereof.

74.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

7. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, knew of or had anything to do with the application for an order, or the issuance

thereof by the three-judge Court, in said insurance rate litigation, or in connection with the distribution of the impounded funds.

75.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

8. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, received any money from one Charles R. Street, or from anyone else, in connection with said insurance rate matter or litigation after October, 1936.

76.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

9. The Court finds that the decree providing for the dismissal of said insurance rate litigation and the distribution of the impounded funds was made on February 1st, 1936.

[fol. 164]

77.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

10. The Court finds that there is no evidence or proof from which a presumption may arise that the defendant, Thomas J. Pendergast knew of the terms of the proposed settlement of said insurance rate litigation.

78.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

11. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, was guilty of misbehavior in the presence of the Court that interfered with the order or decorum of said Court or interfered with the business or proceedings thereof.

79.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

12. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, was guilty of misbehavior in the presence of the Court or so near thereto as to obstruct the administration of justice.

80.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

[fol. 165] 13. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, committed any act of contempt of said three-judge Court.

81.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

14. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, committed any act of contempt of said three-judge Court within three years of the filing of the information herein.

82.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

15. The Court finds that there is no evidence showing or tending to show that the defendant, Thomas J. Pendergast, bribed the defendant, R. E. O'Malley in connection with said insurance rate litigation or the settlement or disposition thereof.

83.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

16. The Court finds that there is no evidence to sustain the following allegation of the information: "At all

times hereinbefore mentioned, the defendants, and each of them, agreed with and between each other that they [fol. 166] would keep all of the transactions hereinbefore enumerated between Charles R. Street, T. J. Pendergast R. E. O'Malley and A. L. McCormack unknown to and concealed from this Honorable Court and that, by affirmative acts of concealment and silence, they would prevent the Court from having any knowledge or any information whatever concerning the fraudulent and corrupt transactions between Charles R. Street and the defendants, T. J. Pendergast, R. E. O'Malley and A. L. McCormack, and that it was their design, purpose and intent, by means aforesaid and by affirmative acts of concealment, to induce and procure a decree of this Honorable Court, and to have the same continued in force, distributing the impounded monies in accordance with the compromise agreed upon at the conference in the Muehlebach Hotel in Kansas City, Missouri, hereinbefore referred to".

84.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

17. The Court finds that the evidence given by A. L. McCormack before the Federal Grand Jury had no connection in any way with the proposed settlement or settlement of the insurance rate litigation or the alleged connection of the defendants therewith.

85.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

[fol. 167] 18. The Court finds that, under all the evidence in the case, the defendant, Thomas J. Pendergast, did not commit a contempt of this Court.

86.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

19. The Court finds that there is no evidence that this defendant, Thomas J. Pendergast, was a party, directly

or indirectly, to the compromise and settlement of the insurance rate litigation.

87.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

20. The Court finds that there is no evidence that this defendant, Thomas J. Pendergast, was a party, directly or indirectly, to the stipulation of settlement aforesaid filed in this Court.

88.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

21. The Court finds that there is no evidence that this defendant, Thomas J. Pendergast, was a party, directly or indirectly, to the presentation of such stipulation of settlement to this Court for its approval, or to the motion for decree therein filed, or to any action taken to obtain the approval of this Court, or to induce the action of this Court [fol. 168] with reference thereto.

89.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

22. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, knew or had any notice that the proposed settlement would be presented to this Court for its approval or that this Court would act thereon and that the said Thomas J. Pendergast cannot be charged with such notice for the reason that this Court was without jurisdiction or authority to act in such matter.

90.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

23. The Court finds, from the evidence, that the maintenance of this prosecution subjects the defendant,

Thomas J. Pendergast, to double jeopardy in violation of the Fifth Amendment to the Constitution of the United States, in that this defendant has heretofore been prosecuted for the alleged offense or offenses sought to be charged in this proceeding under the indictments mentioned in evidence. The said indictments were duly consolidated for trial; a jury was duly empanelled and sworn and the United States thereafter dismissed such indictments and this defendant was acquitted and discharged thereunder; that he has been and is thereby acquitted of the offense or offenses now sought to be charged herein; that the facts and charges set forth in said indictments [fol. 169] were identical with the facts and charges set forth in the information herein; and that the identical evidence necessary to convict under said indictments would be necessary to convict under the information herein.

91.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

24. The Court finds that the allegations in the Bills, original, amended and supplemental, filed by the insurance companies in the insurance rate litigation purported to attack the constitutionality of the Missouri Insurance Statutes; that said allegations were wholly without foundation, at most colorable, and that said allegations were subsequently abandoned and said litigation proceeded solely upon the question of the alleged confiscatory character of the orders of the Superintendent of Insurance and that this Court had no jurisdiction to entertain or pass upon said matter and no jurisdiction to collect or distribute the impounded funds or to enter any order approving or recognizing the settlement of said litigation.

92.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

25. The Court finds that, under the evidence, it had no jurisdiction to entertain the insurance rate litigation.

[fol. 170]

93.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

26. The Court finds that, under the evidence, it has no jurisdiction to entertain the proceedings herein or to try this defendant, Thomas J. Pendergast, for contempt.

94.

Because the three-judge Court erred in failing and refusing to declare this defendant not guilty for each of the reasons specified in the motion of this defendant filed at the close of all the evidence, to declare this defendant not guilty and to dismiss the proceedings.

95.

Because the three-judge Court erred in making and entering its first finding of fact (which said finding is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside the record of this cause, which said finding was made over the objection and exception of this defendant.

96.

Because the three-judge Court erred in making and entering its second finding of fact (which said finding of fact is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by any evidence and is predicated upon alleged matters and facts outside the record in this cause; and for the further reason that it con-
[fol. 171] tains broad and sweeping conclusions of law not predicated upon any evidence in the cause, which said finding was made over the objection and exception of this defendant.

97.

Because the three-judge Court erred in making and entering, over the objection and exception of this defendant, its third finding of fact (which said finding is contained in its opinion) for the reason that said finding is against

the evidence, against the greater weight of the evidence, is unsupported by substantial evidence and is predicated upon alleged matters and facts outside of the record in this cause; and for the further reason that it contains broad and sweeping conclusions of law not predicated upon any evidence in the cause.

98.

Because the three-judge Court erred in making and entering its third finding of fact for the reason that said finding of fact purports to find that this defendant and the other defendants entered into a conspiracy to present to the three-judge Court in open court a purportedly fake settlement and to grossly deceive said Court by the alleged lying, false and fraudulent representations allegedly made in open court at the instance of defendant, which said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, or any evidence, and is predicated upon alleged matters and facts outside the record in this cause, and contains broad and general conclusions of law not [fol. 172] predicated upon any evidence in this cause, and was made over the objection and exception of this defendant.

99.

Because the three-judge Court erred in making and entering, over the objection and exception of this defendant, its fourth finding of fact (which said finding is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside the record in this cause; and for the further reason that said finding contains broad and general conclusions of law not predicated upon any evidence in this cause.

100.

Because the three-judge Court erred in making, over the objection and exception of this defendant, each and every finding of fact made by said Court, whether made in said formal findings of fact or elsewhere in said opinions, or made in its judgment of conviction for the reason that each of said findings is contrary to the evidence, is

contrary to the greater weight of the evidence, is unsupported by substantial evidence, is predicated upon alleged matters and facts outside the record in the cause; and for the reason that each of said findings contains erroneous conclusions of law; not predicated upon any evidence in the cause.

101.

Because the three-judge Court erred in each and all of its conclusions of law.

[fol. 173]

102.

Because the three-judge Court erred in holding in its opinions that it possessed jurisdiction to entertain this proceeding in criminal contempt.

103.

Because the three-judge Court erred in its opinions, findings and judgment of conviction that it possessed jurisdiction to punish for the alleged criminal contempt sought to be charged in the information herein.

104.

Because the three-judge Court erred in holding in its findings, opinions and judgment that any acts of this defendant constituted contempt of said District Court.

105.

Because the three-judge Court erred in holding that any acts of this defendant shown by the evidence constituted contempt of said Court, punishable by said Court in this proceeding.

106.

Because the three-judge Court erred in its findings, opinions and judgment that this proceeding was incidental or ancillary to the so-called insurance rate litigation cases, and in failing to find that this proceeding was an independent proceeding for prosecution for criminal contempt.

107.

Because the three-judge Court erred in holding that this proceeding entitled United States of America vs. Thomas J. Pendergast, et al., No. 5040, an action in criminal

[fol. 174] contempt, was incidental or ancillary to the so-called insurance rate litigation which was a proceeding in equity.

108.

Because the three-judge Court erred in failing and refusing to hold that said Court (even if lawfully convened) was without jurisdiction to entertain, hear or determine a prosecution for criminal contempt initiated on information on the part of the United States against this defendant.

109.

Because the three-judge Court erred in its opinion in this cause in purporting to find in the first footnote to said opinion that this action was a proceeding incidental to American Insurance Co., et al., vs. Thompson, In Equity No. 270, when in fact this proceeding in contempt entitled United States of America vs. Thomas J. Pendergast, et al., was a separate, independent criminal proceeding between the United States of America, plaintiff, and Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, defendants, and was numbered 5040, said number being a number assigned to this cause on the criminal docket of the Central Division of the District Court of the United States for the Western District of Missouri, presided over by the Honorable John C. Collet, District Judge.

110.

Because the three-judge Court erred in its opinion in holding that bribery was committed by this defendant or any of these defendants, or that political influence was brought to bear by the payment to this defendant of $440,000 for the reason that said purported finding and said [fol. 175] statement is unsupported by any evidence in the record in this cause, and is contrary to the evidence.

111.

Because the three-judge Court erred in finding in its opinion that these defendants, allegedly conspirators, committed acts in open court in the presence and face of the three-judge Court grossly to deceive and hoodwink the Judges constituting said Court, said finding being unsupported by any evidence in the record in this cause, and contrary to the evidence; and if said finding was published

in said opinion as a conclusion of law, said conclusion is erroneous and not predicated upon any evidence in the record.

112.

Because the three-judge Court erred in holding, finding and concluding in its opinion that this defendant or these defendants "prostituted the Court to their venal purposes and exposed its Judges to the possibility of disgrace and to certain humiliation", said finding, holding and conclusion being unsupported by any evidence in the record of this cause and contrary to any evidence in the record of this cause.

113.

Because the three-judge Court erred in finding, holding and concluding that these defendants never denied that they were guilty of the alleged misbehavior, and in purporting to predicate a finding of guilt upon said alleged absence of a denial for the reason that said finding is not supported by the evidence, is contrary to the evidence and the pleadings in this cause, and ignores the issues, [fol. 176] and deprives this defendant of rights guaranteed to him by Article V of the amendments to the Constitution of the United States, which Article Provides in part:

"No person shall be * * * compelled in any criminal case to be a witness against himself * * *.

"No person shall be deprived of life, liberty or property without due process of law."

in that the finding of guilt in said cause is based upon the failure of this defendant to testify in said cause.

114.

Because the three-judge Court erred in finding, holding and concluding in its opinion that this defendant and other defendants "stood on their technicalities", and erred in finding these defendants guilty of contempt of said Court on said ground, said finding, holding and conclusion being in violation of this defendant's constitutional right guaranteed to him by Article V of the amendments to the Constitution of the United States, which, in part, provides as follows:

"No person shall be * * * compelled in any criminal case to be a witness against himself * * *.

"No person shall be deprived of life, liberty or property without due process of law."

in that the finding of guilt in said cause is based upon the failure of this defendant to testify in said cause.

115.

Because the three-judge Court erred in making a purported finding in a footnote to its opinion as follows:

"The whole history of the criminal cases which resulted in the imposition of sentences on Pendergast and O'Malley for attempted evasion of income taxes, including much which throws light upon the background of [fol. 177] the present proceeding in contempt, is set out in United States vs. Pendergast and O'Malley, 28 Fed. Supp. 601"

for the reason that said purported finding is not based upon any evidence in this cause, is outside the record, and attempts to incorporate into this proceeding matters outside the record.

116.

Because the three-judge Court erred in holding, finding and concluding in its opinion that this defendant confessed any alleged misbehavior or that this defendant had as well confess any alleged misbehavior; said finding being unsupported by any evidence in the record, and contrary to any evidence in the record; and in basing its opinion of guilt upon said finding, the three-judge Court thereby deprived defendant of his life and liberty without due process of law in violation of Article V of the amendments to the Constitution of the United States of America, which said Article provides in part as follows:

"No person shall be * * * compelled in any criminal case to be a witness against himself * * *.

"No person shall be deprived of life, liberty or property without due process of law."

in that the finding of guilt in said cause is based upon the failure of this defendant to testify in said cause.

117.

Because the three-judge Court erred in erroneously construing the case of Nye and Mayers vs. United States of

America, decided by the Supreme Court of the United States on April 10, 1941 and reported in 85 L. Ed. 733, and in drawing unreasonable and unwarranted inferences therefrom, and in holding that said decision was not ap- [fol. 178] plicable to this proceeding.

118.

Because the three-judge Court erred in finding, holding and concluding that this defendant and the other defendants "sent their messengers (their innocent and unsuspecting messengers) to the very courtroom and into open court", said finding being unsupported by any evidence in the record in this cause and contrary to the evidence in the record in this cause.

119.

Because the three-judge Court erred in finding, holding and concluding in its opinion that the alleged "misbehavior of these defendants was committed where it took effect and where it was intended to take effect"; said finding, holding and conclusion being unsupported by any evidence in the record in this proceeding, and contrary to any evidence in the record in this proceeding.

120.

Because the three-judge Court erred in its opinion in failing and refusing to consider the contention of this defendant that a three-judge court had no jurisdiction, power or authority to entertain this proceeding in criminal contempt.

121.

Because the three-judge Court erred in finding, holding and concluding in its opinion that the alleged "whole transaction was for the express purpose of effecting a settlement of the insurance litigation"; said finding, holding and conclusion being unsupported by any evidence in the record in this cause and contrary to the evidence [fol. 179] in the record in this cause.

122.

Because the three-judge Court erred in its deduction that the facts allegedly proved that there was a conspiracy between Street, O'Malley, McCormack and this defendant

to obtain decrees disposing of the impounded fund, for the reason that said purported finding and deduction is not within the pleadings, unsupported by the evidence, and contrary to the evidence.

123.

Because the three-judge Court erred in its opinion in this cause in holding that the prosecution herein was not barred by the statute of limitations, for each and all of the following reasons: (1) because it appears from the face of the information herein that said prosecution against this defendant is barred by the statute of limitations; (2) because under the evidence in the cause it appears that said prosecution is barred by the statute of limitations; (3) because each and all of the three-judge Court's findings with reference to the statute of limitations are unsupported by the evidence and contrary to the undisputed evidence; (4) because it affirmatively appears from the evidence that the theory upon which the three-judge Court held that the statute of limitations did not apply was erroneous in law and unsupported by the evidence.

124.

Because the three-judge Court erred in holding, finding and concluding that the alleged deception of this defendant and the other defendants continued the alleged misbehavior far beyond the actual entry of the decree in the insurance rate litigation, for the reason that said finding [fol. 180] is unsupported by the evidence and is contrary to the undisputed evidence, and is erroneous in law.

125.

Because the three-judge Court erred in finding in its opinion that this defendant and the other defendants committed particular acts of "supplemental deception", said finding being unsupported by any evidence in the record in this cause and contrary to the evidence.

126.

Because the three-judge Court erred in its purported findings in its opinion to the effect that McCormack committed perjury before the Grand Jury, and that said alleged perjury was committed as a result of an agreement

between the defendants and was an affirmative act of deception, for the reason that said purported finding is unsupported by the evidence and is an erroneous conclusion of law which is contrary to the evidence.

127.

Because the three-judge Court erred in finding that it could be reasonably inferred that this defendant and the other defendants had entered into an agreement with reference to McCormack's testimony before said Grand Jury, for the reason that said purported inference is unwarranted by the evidence, is contrary to the evidence, and was affirmatively destroyed by the undisputed and uncontradicted evidence offered on behalf of the Government.

128.

Because the three-judge Court erred in its opinion in [fol. 181] holding, concluding and finding that the alleged acts of the defendant were calculated to stir the Court's resentment and anger, and that the stirring of the Court's resentment and anger was the actual offense allegedly committed by this defendant and the other defendants, for the reason that said finding is erroneous in law, unsupported by the evidence, and contrary to the evidence.

129.

Because the three-judge Court erred in finding, holding and concluding that "There is no statute of limitations applicable to contempt committed 'in the presence of the Court' ", for the reason that said statement is an erroneous conclusion of law, and for the further reason that it affirmatively appears from the evidence in this cause that there was no contempt committed in the presence of said Court.

130.

Because the three-judge Court erred in finding, holding and concluding in its opinion that the statute of limitations did not begin to run in this case until the alleged deception practiced by the defendants "ceased to have effect, nor until the last alleged affirmative set fortifying the alleged deception was committed by the alleged conspirators, or any of them, nor until the essence of the

alleged contempt became an active principle by the discovery of the truth", for the reason that said conclusion is erroneous in law and unsupported by any evidence in the record, and unwarranted by the evidence in the record.

[fol. 182]

131.

Because the three-judge Court erred in its opinion in holding that this defendant had not been subjected to double jeopardy by reason of the previous prosecution and acquittal of this defendant in Causes No. 14912 and 14932 in the District Court of the United States entitled United States of America, plaintiff, vs. Thomas J. Pendergast, R. E. O'Malley and A. L. McCormack, defendants, for the reason that said purported finding that the maintenance of this prosecution did not constitute double jeopardy is contrary to the undisputed evidence, and the conclusions of the Court in connection therewith are unsupported by the evidence, erroneous in law, and contrary to the record entries, verdicts and judgment in the causes hereinabove mentioned.

132.

Because the three-judge Court erred in its opinion in purporting to find that the agreement between the United States of America and this defendant, made and entered into prior to the entering of the plea of guilty in the income tax case mentioned in evidence, did not entitle the defendant to a dismissal of this cause, for the reason that said finding is contrary to the terms and provisions of said agreement, contrary to the undisputed evidence in the cause, contrary to the judicial admissions made by the Government in the trial of this cause in open court, and contrary to the stipulation shown in the record in this cause.

133.

Because the three-judge Court erred in its opinion by finding, holding and concluding that the United States District Attorney only made known the agreement not [fol. 183] to further prosecute this defendant at the instance and request of counsel for this defendant and the other defendants, and until after this defendant and defendant O'Malley had been sentenced, and the term had passed, and after sentence could not be changed, and in purportedly finding that said United States District At-

torney did not intend or contemplate that said agreement would extend to this proceeding in contempt, for the reason that said finding is contrary to the undisputed evidence in the cause and is unsupported by any evidence, and constitutes an unwarranted purported interpretation of the agreement shown by the evidence.

134.

Because the three-judge Court erred in finding, holding and concluding that this defendant and the other defendants "did everything conceivably possible to be done to avoid trial" under indictments returned in Causes entitled United States of America, plaintiff, vs. Thomas J. Pendergast, R. E. O'Malley and A. L. McCormack, defendants, No. 14912 and 14932, in the District Court of the United States for the Western Division of the Western District of Missouri, for the reason that said finding is unsupported by any evidence in the record, and contrary to the evidence.

135.

Because the three-judge Court erred in failing and refusing to give effect to the agreement mentioned in evidence between the United States, acting through the District Attorney, and this defendant, either by abating this prosecution or staying proceedings herein, or sentence herein, pending an application to the Executive for clemency and the action of the Executive thereon.

[fol. 184]

136.

Because the three-judge Court erred in overruling the motion for new trial filed herein by defendant Thomas J. Pendergast and erred in failing to sustain said motion for new trial upon each and all of the grounds therein contained.

137.

Because the three-judge Court erred in the following rulings (which said rulings were made and entered by the District Court on June 7, 1941):

1. The Court erred in admitting over the objections and exceptions of defendant, and in refusing to strike on the motion of defendant, and in refusing to limit on the

motion of defendant, each of the following items of evidence;

(a) Testimony of McCormack to the effect that in St. Louis he had a conversation with defendant O'Malley wherein O'Malley allegedly asked if the companies would be interested in settling the rate litigation, and suggested a meeting between Street and Pendergast, as hearsay and not binding on this defendant.

(b) Testimony of McCormack to the effect that he advised Street of the St. Louis conversation and Street agreed to talk to Pendergast, as hearsay and not binding on this defendant.

(c) Testimony of McCormack that O'Malley advised him that Pendergast would be in Chicago on a given date and he so advised Street.

(d) Testimony of McCormack that he notified Street of Pendergast's visit in Chicago, that Street asked him if he would take money to Pendergast, that he conversed with O'Malley in St. Louis and that O'Malley asked him for his share, claimed conversations between McCormack and O'Malley about $22,500.00 and $40,000.00, and $10,000.00 to be delivered at Menorah hospital, that O'Malley asked him to leave his name out before the Grand Jury, as hearsay and not binding on this defendant, this assignment being directed to each of said conversations.

2. The Court erred in overruling defendant's objection to judicial noticing of proceedings in the rate controversy and to the taking of such notice.

3. The Court erred in directing the Clerk to alter the numbering and designation of this cause.

[fol. 185] 138.

Because the three-judge Court erred in its opinion and in the conclusion thereof in finding this defendant guilty, and in its judgment entered herein for each and all of the reasons hereinbefore stated, which said reasons are here reassigned with the same force and effect as if again set out herein.

WHEREFORE, by reason whereof and on account of the errors above assigned and cited, and of which complaint is herein made, the defendant Thomas J. Pendergast prays

that the findings, orders, judgment and sentence of the three-judge Court entered against said defendant herein be reversed, set aside and for naught held.

Dated this 7th day of June, 1941.

R. R. Brewster
John G. Madden
James E. Burke
Attorneys for Defendant
Thomas J. Pendergast.

Filed in the United States District Court June 7, 1941

[fol. 186] (Order Allowing Appeal to Defendant, Thomas J. Pendergast.)

In the District Court of the United States for the Central Division of the Western District of Missouri. United States of America, Plaintiff, vs. Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, Defendants. No. 5040 a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

Before Kimbrough Stone, Circuit Judge, Albert L. Reeves and Merrill E. Otis, District Judges.

Now on this 7th day of June, 1941, comes the defendant Thomas J. Pendergast, and having filed petition for appeal and notice of appeal, together with assignments of error and grounds for appeal, and having presented the same to the Court for allowance, and the Court having read and considered said petition for appeal, notice of appeal and the assignments of error and grounds for appeal doth

ORDER, That an appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the judgment of conviction heretofore entered in said District Court, be, and the same is hereby allowed to said defendant; that a writ of appeal issue herein; that a certified transcript of the testimony, exhibits and all proceedings be forthwith transmitted to the United States Circuit Court of Appeals for the Eighth Circuit as aforesaid, and that upon said defendant giving bond, according to law, in the sum of $2,500.00, defendant Thomas J. [fol. 187] Pendergast shall be allowed to appeal, and said

bond shall act as a supersedeas and stay of execution pending the termination of said appeal.

Kimbrough Stone
United States Circuit Judge.
Albert L. Reeves
United States District Judge.
Merrill E. Otis
United States District Judge.

Filed in the United States District Court June 7, 1941

[fol. 188] (Bail or Appearance Bond of Thomas J. Pendergast.)

KNOW ALL MEN BY THESE PRESENTS:

That we, Thomas J. Pendergast, the above named defendant, as principal and NATIONAL SURETY CORPORATION, as surety, do acknowledge ourselves to be indebted unto the United States of America, in the sum of Twenty five hundred ($2500.00) DOLLARS, upon the following conditions:

In Witness Whereof, we have hereunto set our hands and seals this 7th day of June, 1941.

WHEREAS, lately, at the March, 1941 term of the United States District Court in and for the Central Division of the Western District of Missouri, in the above entitled cause, the defendant was convicted and sentenced for contempt of court; and

WHEREAS, said defendant has duly appealed from the judgment of conviction and sentence; and

[fol. 189] WHEREAS, said defendant has been duly admitted to bail pending an appeal from the said conviction and sentence and the amount of bail bond for the appearance of said defendant has been fixed by the said court in the sum of Twenty five hundred dollars ($2500.00).

Now, the condition of this obligation is such that if the said Thomas J. Pendergast shall appear either in person or by his attorney in the United States Circuit Court

of Appeals for the Eighth Circuit on such day or days as may be appointed for the hearing of said cause in said court and prosecute his said appeal; and shall surrender himself at the time and place and to the proper authorized officer as said Circuit Court of Appeals may direct in the event the judgment of conviction and sentence be affirmed or the appeal is dismissed, and shall appear for trial in this statutory United States District Court for the Central Division of the Western District on such day or days as may be appointed for retrial by said District Court, in the event the judgment of conviction and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Eighth Circuit, then the obligation to be void, otherwise to remain in full force and effect.

Surety does not hereby obligate itself in any way to pay any find or costs assessed against the defendant, Thomas J. Pendergast, in the above entitled cause.

Thomas J. Pendergast
Principal,
National Surety Corporation
(Seal)
By G. B. Howland
Attorney-in-fact
Surety

APPROVED as to Form, Amount and Surety:
Richard K. Phelps
Asst. United States District Attorney.

APPROVED:

Circuit Judge
Albert L. Reeves
District Judge

District Judge

(Judges Before Whom Defendant was Tried.)

Filed in the United States District Court June 7, 1941.

[fol. 190] (Notice of Appeal of Defendant, Robert Emmett O'Malley.)

In the District Court of the United States of America for the Central Division of the Western District of Missouri. United States of America, Plaintiff, vs. [Thimas] J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack, Defendants. No. 5,040. a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

Before KIMBROUGH STONE, Circuit Judge, ALBERT L. REEVES and MERRILL E. OTIS, District Judges.

Name and address of appellant: Robert Emmett O'Malley, 712 West 48th Street, Kansas City, Jackson County, Missouri.

Name and address of appellant's attorneys: James P. Aylward, George V. Aylward, Terence M. O'Brien, Ralph M. Russell, 1215 Commerce Building, Kansas City, Missouri.

Offense: Contempt of Court.

Date of judgment: June 7, 1941.

Brief description of judgment or sentence: Defendant found guilty of contempt - sentenced to two years in United States Institution of penitentiary type.

Name of prison where now confined, if not on bail: Defendant is now on bail.

I, the above named appellant, hereby appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the judgment above mentioned on the grounds set forth below.

Robert Emmet O'Malley
Appellant.

Dated June 7, 1941.

Service acknowledged above date

Richard K. Phelps, Asst U. S. Atty and amicus curiae
By Charles F. Lamkin, Asst U. S. Atty

[fol. 191] 1. Because the three-judge court erred in failing to hold that under the pleadings, the law and the evidence, this defendant was not shown to be guilty of the offense sought to be charged in this proceeding.

2. Because under the pleadings, the law and the evidence, this defendant is entitled to judgment and the three-judge court erred in failing to render judgment on behalf of this defendant.

3. Because the three-judge court erred in failing to find the defendant not guilty of contempt of court under the pleadings, the law and the evidence.

4. Because the three-judge court erred in not finding under the pleadings, the law and the evidence, that this defendant was not shown to be guilty of contempt which this three-judge court had power or authority to punish.

5. Because the three-judge court was without jurisdiction to entertain, hear or determine this proceeding and erred in not so holding.

6. Because the three-judge court erred in assuming jurisdiction to entertain, hear or determine this proceeding in contempt, or to try to convict this defendant of the defense sought to be charged.

7. Because the three-judge court erred in assuming jurisdiction to punish this defendant for the alleged contempt sought to be charged.

8. Because the three-judge court was illegally convened at the inception of the insurance rate litigation mentioned in evidence (American Insurance Co. vs. Joseph B. Thompson, Superintendent of Missouri, et al., No. 270 in Equity, and companion cases bearing Docket Nos. 271 to 426, incl.) and did not lawfully acquire jurisdiction therein.

[fol. 192] 9. Because the three-judge court was without jurisdiction to entertain, consider, approve or disapprove the purported settlement or stipulation of settlement of the insurance rate litigation mentioned in evidence, and erred in assuming, undertaking or entertaining such jurisdiction.

10. Because the three-judge court was without jurisdiction to disburse or supervise the disbursement of impounded funds mentioned in evidence.

11. Because the purported settlement of the insurance rate litigation mentioned in evidence was a nullity and not susceptible of approval or enforcement by the three-judge court, and the three-judge court erred in holding that said matter was within its jurisdiction.

12. Because, if the three-judge court acquired jurisdiction of the insurance rate litigation mentioned in evidence (which this defendant denies) under the colorable averments of the bills filed, such jurisdiction was lost prior to the proceedings in said litigation relating to the purported settlement thereof; and that said three-judge court thereafter had no power or authority under the law to act therein.

13. Because, prior to the proceeding in the insurance rate litigation relating to the purported settlement thereof, the three-judge court and the litigants in said insurance rate litigation recognized the constitutionality of the State statutes assailed in the bills in equity therein, and were proceeding solely upon the theory that the action of the Superintendent of Insurance of the State Of Missouri, under constitutional statutes was confiscatory; as a result, any jurisdiction it may have theretofore acquired was thereupon lost and the three-judge court erred in proceeding thereafter, and was acting contrary to the terms and provisions of the Statutes of the United States authorizing the calling of a three-judge court.

[fol. 193] 14. Because the three-judge court under the statutes in such cases made and provided, could have acquired no jurisdiction in the insurance rate litigation mentioned in evidence other than to grant or deny injunctive relief sought on the ground of the unconstitutionality of a State statute or State statutes; and that in purportion to entertain, hear, consider, approve and enforce the purported settlement of said insurance rate litigation, in whole or in part, the three-judge court was acting extrajudicially and its action was a nullity and void; and the three-judge court erred in continuing to assert jurisdiction thereafter.

15. Because the bills in equity filed by the insurance companies in the insurance rate litigation mentioned in evidence failed to state a cause of action, were not petitions or bills to review the action of the Superintendent of Insurance complained of, did not justify or authorize injunctive relief by the three-judge court, were insuf-

ficient to authorize the creation or formation of a three-judge court, and said three-judge court sought to be convened, acquired no lawful jurisdiction and said three-judge court erred in asserting jurisdiction or [prodeeding] in said causes.

16. Because the three-judge court erred in charging this defendant with notice of the terms of the purported settlement, or that said purported settlement would be reduced to a written agreement and presented to the three-judge court for its approval, or that said three-judge court would act thereon, when such settlement was a nullity and when said three-judge court was without jurisdiction or authority to act thereon.

17. Because the three-judge court erred in asserting jurisdiction to direct the disbursement of the impounded funds mentioned in evidence in accordance with the purported settlement of said insurance rate litigation, or in taking any action thereon.

[fol. 194] 18. Because the three-judge court at the time of the alleged contempt charge herein was not a lawfully constituted court or exercising any lawful or constitutional or statutory jurisdiction, and its proceedings were erroneous and extrajudicial.

19. Because at the time of the institution of this proceeding, the three-judge court was not a lawfully constituted court or exercising any lawful or constitutional jurisdiction, and the three-judge court erred in attempting to assert jurisdiction herein.

20. Because the three-judge court, convened as a court of limited statutory jurisdiction, was without authority or jurisdiction to entertain, hear or determine this proceeding.

21. Because this proceeding was and is an independent action at law and not a part of the original proceeding in equity over which the three-judge court was attempting to assert jurisdiction; and said three-judge court therefore was without jurisdiction herein.

22. Because this proceeding is a prosecution for alleged criminal contempt and the three-judge court is vested with no jurisdiction thereover.

23. Because this proceeding was neither instituted nor maintained for the benefit of any litigant in the insurance rate litigation mentioned in evidence, or to coerce or com-

pel obedience to any order, ruling, decree, or other purported exercise of jurisdiction by the three-judge court in said litigation, but solely to punish for past acts allegedly [contmeptuous] of said three-judge court, and said three-judge court, vested at most with jurisdiction (which defendant denies) for limited purposes in said original proceeding in equity, was without jurisdiction, power or authority so to punish.

24. Because, if this proceeding could lawfully be maintained (which this defendant denies), jurisdiction therein was vested in the District Court for the Central Division of the Western District of Missouri, presided over by Honorable John C. Collet, District Judge, and not in the [fol. 195] three-judge court which purported to exercise jurisdiction in this cause.

25. Because the information filed herein fails to state a cause of action against this defendant.

26. Because the information filed in this proceeding shows upon its face that it is barred by the statute of limitations and that the alleged contemptuous acts asserted therein occurred more than three years next before the institution of said proceeding.

27. Because the information shows that the alleged contemptuous acts sought to be charged against this defendant could not and did not constitute (a) contempt of court, (b) contempt of said three-judge court, (c) contempt of said three-judge court which said three-judge court had power, jurisdiction or authority to punish, or (d) contempt of said three-judge court, which said three-judge court had power or jurisdiction or authority to punish by summary process or by any procedure other than indictment.

28. Because the information shows upon its face that the three-judge court was without jurisdiction in this action.

29. Because the maintenance of this prosecution subjected this defendant to double jeopardy in violation of the Fifth Amendment to the Constitution of the United States, in that this defendant had heretofore been prosecuted for the alleged offense or offenses sought to be charged in this proceeding under the indictments mentioned in evidence (United States vs. Thomas J. Pendergast, R. E. O'Malley and A. L. McCormack, No. 14912 and

14932, in the District Court of the United States for the Western Division of the Western District of Missouri), which said indictments were duly consolidated for trial, and a jury duly impaneled and sworn and the United States thereafter dismissed said indictments and this defendant was acquitted and discharged thereunder, thereby having been acquitted of the offense or offenses charged [fol. 196] in this proceeding; and the three-judge court erred in failing to so hold.

30. Because this defendant has been prosecuted by the United States for the alleged offense or offenses sought to be charged in this proceeding under the indictments mentioned in evidence, which said indictments were consolidated for trial and a jury duly impaneled and sworn, and the United States thereafter dismissed said indictments and this defendant was acquitted and discharged thereunder, thereby having been acquitted of the offense or offenses sought to be charged in the information herein.

31. Because under the evidence it appears that this prosecution was barred by the statute of limitations and that said prosecution was not instituted or the information filed within three years next after the occurrence of the alleged contemptuous acts, and the three-judge court erred in failing to so find.

32. Because the evidence on the trial before the three-judge court failed to show (a) that defendant was guilty of the offense charged or sought to be charged; (b) that the defendant was guilty of contempt of court; (c) that the defendant was guilty of contempt of said three-judge court; (d) that defendant was guilty of contempt of said three-judge court, which said three-judge court had power or authority to punish; (e) that defendant was guilty of contempt of said three-judge court, which said three-judge court had power or authority to punish by summary process or by information or by procedure other than indictment; and the said three-judge court erred in failing so to find.

33. Because the acts charged against defendant and shown by the evidence did not constitute (a) contempt, (b) contempt of the three-judge court, (c) contempt of the three-judge court, which said three-judge court had power or authority to punish, (d) contempt of said three-[fol. 197] judge court, which said three-judge court had power or authority to punish in this proceeding or otherwise than by indictment.

34. Because the evidence failed to show that this defendant was guilty of any act in law contemptuous of the three-judge court; and said three-judge court erred in failing to find the defendant not guilty.

35. Because this defendant could not properly be charged with the act or acts of others in allegedly inducing action on the part of the three-judge court, or expressly or by implication perpetrating a fraud upon said three-judge court when there was no evidence that this defendant was a party thereto or knew or anticipated that any action would or was to be thus induced or any fraud so perpetrated; and no conspiracy was charged in the information or shown by the evidence; and the three-judge court erred in charging this defendant with any act or acts of others in said particulars.

36. Because the evidence failed to show this defendant guilty beyond a reasonable doubt; and the three-judge court erred in its finding of guilt.

37. Because the character of the Government's proof was such as to be insufficient to warrant a finding of guilt beyond reasonable doubt; and the three-judge court erred in so finding.

38. Because this prosecution was barred by reason of the agreement not to prosecute shown in the evidence, which said agreement was made between this defendant and the United States whereby and whereunder this defendant entered a plea of guilty mentioned in evidence in the income tax case mentioned in evidence, and served the sentence thereupon imposed; and the three-judge court erred in failing to find that said prosecution was barred by reason of said agreement, and in purporting to find that said prosecution was not barred by reason of said agreement.

[fol. 198] 39. Because the members of the three-judge court who purported to act in this cause were in fact disqualified in said proceeding, and in acting therein deprived this defendant of liberty and property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

40. Because there was no evidence that this defendant was a party to the actual settlement agreed upon in the insurance rate case or to any act or acts of others in connection with such settlement, or in the approval there-

of; and the three-judge court erred in making each finding made in connection therewith.

41. Because there was no evidence in this cause that this defendant participated in any act or acts contemptuous of the three-judge court, or was chargeable with any intent or design so to do.

42. Because there was no evidence that this defendant was a party directly or indirectly to the compromise or settlement of the insurance rate litigation actually executed; and the three-judge court erred in its findings in connection therewith.

43. Because there was no evidence that this defendant was a party directly or indirectly to the stipulation of settlement mentioned in evidence; and said three-judge court erred in its finding with reference thereto.

44. Because there was no evidence that this defendant was a party directly or indirectly to any presentation of the stipulation of settlement mentioned in evidence, to the three-judge court for its approval (if there was evidence that such settlement was presented for approval, which defendant denies), or to the motion for decree mentioned in evidence, or to any action taken to obtain the approval of said three-judge court to said stipulation, or to induce any action on the part of said three-judge court with reference thereto; if there is evidence of any such action, which defendant denies; and the three-judge court erred in its finding in connection therewith.

[fol. 199] 45. Because there was no evidence that there was any agreement between the defendants herein and Charles R. Street or between this defendant or any of the other defendants to the effect that they or any of them would keep the alleged transactions between them unknown to, or concealed from the said three-judge court, or that by affirmative acts of concealment or silence they or any of them would prevent said three-judge court from obtaining knowledge or information with reference thereto; and the evidence of the Government in the trial of said cause was affirmatively to the contrary; and that by reason thereof the Government cannot rely upon any inference or presumption with reference to any such alleged agreement; and the Government is entitled to no such inference or presumption for the further reason that the evidence was undisputed that this defendant was not

a party to any such agreement of any kind or character; and by reason of the facts aforesaid, the three-judge court erred in making its findings that there was such agreement, its finding of guilt and in making each all of its findings in connection with such alleged agreements.

46. Because there was no evidence that any concealment by A. L. McCormack before the United States Grand Jury of any facts relating to the settlement of the insurance rate litigation mentioned in evidence, if there was evidence of any such concealment, which defendant denies, was in furtherance of, or pursuant to any agreement whatsoever, and particularly to any agreement to which this defendant was ever a party; and the evidence of the Government affirmatively disproved any such contention; and that by reason thereof, the three-judge court erred in failing to find the defendant not guilty, and in failing to find that this action was barred by the statute of limitations; and further erred in making each and every finding which was made by said three-judge court in connection with said alleged Grand Jury testimony.

[fol. 200] 47. Because there was no evidence that any alleged communication between the defendant R. E. O'Malley and defendant A. L. McCormack during the course of the grand jury inquiry mentioned in evidence was at the instance or request of this defendant, or pursuant to, or in furtherance of any agreement to which this defendant was a party; and the three-judge court erred in making its finding of guilt and in failing to hold that this action was barred by the statute of limitations; and further erred in the making of each finding made in connection with said alleged communication or communications.

48. Because there was not sufficient evidence to warrant a finding of guilt against this defendant; and the three-judge court erred in making such finding.

49. Because there was no evidence sufficient to establish the offense charged or sought to be charged; and the three-judge court erred in connection with each and every finding made in connection therewith.

50. Because there was no evidence sufficient to establish that this defendant was a party to any act contemptuous of the three-judge court; and the three-judge court erred in making its finding of guilt.

51. Because the evidence of the Government, binding upon the Government, affirmatively established the non-participation of this defendant in any act allegedly contemptuous of the three-judge court; and the three-judge court erred in failing to so find.

52. Because there was no evidence sufficient to establish the necessary elements and ingredients of the offense sought to be charged; and the three-judge court erred in making its finding of guilt.

53. Because there was no evidence sufficient to establish any offense on the part of this defendant committed within the jurisdiction of the three-judge court; and the three-judge court erred in making its finding of guilt for said reason.

[fol. 201] 54. Because there was no evidence sufficient to establish criminal intent on the part of this defendant; and the three-judge court erred in failing so to find.

55. Because there was no evidence sufficient to establish contemptuous intent upon the part of this defendant; and the three-judge court erred in its finding of guilt.

56. Because there was no evidence sufficient to establish that this defendant was guilty of [misbehaivor] in the presence of the three-judge court, or so near thereto as to obstruct the administration of justice; and the three-judge court erred in finding this defendant guilty.

57. Because the three-judge court erred in overruling and denying and failing to sustain the motion of this defendant to abate and quash the information filed in said three-judge court, and to withdraw the rule to show cause for each and all of the reasons therein appearing.

58. Because the three-judge court erred in overruling and denying, and in failing to sustain the motion of this defendant at the close of the evidence of the United States to declare this defendant not guilty and to dismiss this proceeding, for each and all of the reasons therein appearing, and for each and all of the grounds therein stated.

59. Because the three-judge court erred in overruling and denying, and failing and refusing to sustain the motion of this defendant at the close of all the evidence to declare this defendant not guilty, and to dismiss this proceeding, for each and all of the reasons contained in said motion.

60. Because the three-judge court erred in admitting and receiving, over the objection and exception of this defendant, incompetent, irrelevant and immaterial evidence.

[fol. 202] 61. Because the three-judge court erred in excluding, over the exceptions of this defendant, competent, material and relevant evidence duly offered by this defendant.

62. Because the three-judge court erred in overruling and failing and refusing to sustain motions to strike incompetent, irrelevant and immaterial evidence, which said motions were duly made by this defendant.

63. Because the three-judge court erred in overruling, and in failing and refusing to sustain motions duly made by this defendant to limit and restrict the effect of purported evidence.

64. Because the findings, opinions and judgment of the three-judge court are against the law and the evidence.

65. Because the findings, opinions and judgment of the three-judge court, and each part thereof, are unsupported by substantial evidence.

66. Because the findings, opinions and judgment of the three-judge court are against the greater weight of the evidence.

[fol. 203] 67. Because the three-judge court erred in failing and refusing to declare this defendant not guilty for each of the reasons specified in the motion of this defendant filed at the close of all the evidence, to [declare] this defendant not guilty and to dismiss the proceedings.

68. Because the three-judge court erred in making and entering its first finding of fact (which said finding is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside the record of this cause, which said finding was made over the objection and exception of this defendant.

69. Because the three-judge court erred in making and entering its second finding of fact (which said finding of fact is contained in its opinion) for the reason that said

finding is against the evidence, against the greater weight of the evidence, is unsupported by any evidence and is predicated upon alleged matters and facts outside the record in this cause; and for the further reason that it contains broad and sweeping conclusions of law not predicated upon any evidence in the cause, which said finding was made over the objection and exception of this defendant.

70. Because the three-judge court erred in making and entering, over the objection and exception of this defendant, its third finding of fact (which said finding is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence and is predicated upon alleged matters and facts outside of the record in this cause; and for the further reason that it contains broad and sweeping conclusions of law not predicated upon any evidence in the cause.

[fol. 204] 71. Because the three-judge court erred in making and entering its third finding of fact for the reason that said finding of fact purports to find that this defendant and the other defendants entered into a conspiracy to present to the three-judge court in open court a purportedly fake settlement and to grossly deceive said three-judge court by the alleged lying, false and fraudulent representations allegedly made in open court at the instance of defendant, which said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, or any evidence, and is predicated upon alleged matters and facts outside the record in this cause, and contains broad and general conclusions of law not predicated upon any evidence in this cause, and was made over the objection and exception of this defendant.

72. Because the three-judge court erred in making and entering, over the objection and exception of this defendant, its fourth finding of fact (which said finding is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside the record in this cause; and for the further reason that said finding contains broad and general conclusions of law not predicated upon any evidence in this cause.

73. Because the three-judge court erred in making, over the objection and exception of this defendant, each and every finding of fact made by said Court, whether made in said formal findings of fact or elsewhere in said opinions, or made in its judgment of conviction for the reason that each of said findings is contrary to the evidence, is contrary to the greater weight of the evidence, is unsupported by substantial evidence, is predicated upon alleged matters and facts outside the record in the cause; [fol. 205] and for the reason that each of said findings contains erroneous conclusions of law, not predicated upon any evidence in the cause.

74. Because the three-judge court erred in each and all of its conclusions of law.

75. Because the three-judge court erred in holding in its opinions that it possessed jurisdiction to entertain this proceeding in criminal contempt.

76. Because the three-judge court erred in its opinion, findings and judgments of conviction that it possessed jurisdiction to punish for the alleged criminal contempt sought to be charged in the information herein.

77. Because the three-judge court erred in holding in its findings, opinions and judgment that any acts of this defendant constituted contempt of said three-judge court.

78. Because the three-judge court erred in holding that any acts of this defendant shown by the evidence constituted contempt of said court, punishable by said court in this proceeding.

79. Because the three-judge court erred in its findings, opinions and judgment that this proceeding was incidental or ancillary to the so called insurance rate litigation causes, and in failing to find that this proceeding was an independent proceeding for prosecution for criminal contempt.

80. Because the three-judge court erred in holding that this proceeding entitled United States of America vs. Thomas J. Pendergast, et al., No. 5040, an action in criminal contempt, was incidental or ancillary to the so-called insurance rate litigation which was a proceeding in equity.

81. Because the three-judge court erred in failing and refusing to hold that a statutory three-judge court is without jurisdiction to entertain, hear or determine a

prosecution for criminal contempt initiated on informa-
[fol. 206] tion on the part of the United States against this defendant.

82. Because the three-judge court erred in its opinion in this cause in purporting to find in the first footnote to said opinion that this action was a proceeding incidental to American Insurance Co., et al., vs. [Thomspon], In Equity No. 270, when in fact this proceeding in contempt entitled United States of America, vs. Thomas J. Pendergast, et al., was a separate, independent criminal proceeding between the United States of America, plaintiff, and Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, defendants, and was numbered 5040, said number being a number assigned to this cause on the criminal docket of the Central Division of the District Court of the United States for the Western District of Missouri, presided over by the Honorable John C. Collet, District Judge.

83. Because the three-judge court erred in its opinion in holding that bribery was committed by this defendant or any of these defendants, or that political influence was brought to bear by the payment to this defendant of $440,000 for the reason that said purported finding and said statement is unsupported by any evidence in the record in this cause, and is contrary to the evidence.

84. Because the three-judge court erred in finding in its opinions that these defendants, allegedly conspirators, committed acts in open court in the presence and face of the Court grossly to deceive and hoodwink the Judges constituting the Court, said findings being unsupported by any evidence in the record in this cause, and contrary to the evidence; and if said finding was published in said opinions as a conclusion of law, said conclusion is erroneous and not predicated upon any evidence in the record.

85. Because the three-judge court erred in holding, finding and concluding in its opinions that this defendant or these defendants "prostituted the Court to their
[fol. 207] venal purposes and exposed its Judges to the possibility of [disgrase] and to certain humiliation," said finding, holding and conclusion being unsupported by any evidence in the record of this cause and contrary to any evidence in the record of this cause.

86. Because the three-judge court erred in finding, holding and concluding that these defendants never denied that they were guilty of the alleged misbehavior, and in purporting to predicate a finding of guilt upon said alleged absence of a denial for the reason that said finding is not supported by the evidence, is contrary to the evidence and the pleadings in this cause, and ignores the issues.

87. Because the three-judge court erred in finding, holding and concluding in its opinion that this defendant and other defendants "stood on their technicalities", and erred in finding these defendants guilty of contempt of said three-judge court on said ground, said finding, holding and conclusion being in violation of this defendant's constitutional right guaranteed to him by Article V of the amendments to the Constitution of the United States, which in part, provides as follows:

> "No person shall be * * * compelled in any criminal case to be a witness against himself * * *",

in that the finding of guilt in said cause is based and predicated upon the failure of this defendant to testify in said cause.

88. Because the three-judge court erred in making a purported finding in a footnote to its opinion as follows:

> "The whole history of the criminal cases which resulted in the imposition of sentences on Pendergast and O'Malley for attempted evasion of income taxes, including much which throws light upon the background of the present proceeding in contempt, is set out in United States vs. Pendergast and O'Malley, 28 Fed. Supp. 601"

for the reason that said purported finding is not based upon any evidence in this cause, is outside the record, and attempts to incorporated into this proceeding matters not [fol. 208] in issue.

89. Because the three-judge court erred in holding, finding and concluding in its opinion that this defendant confessed any alleged misbehavior or that this defendant had as well confessed any alleged misbehavior; said finding being unsupported by any evidence in the record, and contrary to any evidence in the record; and in basing its opinion of guilt upon said finding, the three-judge court

thereby deprived defendant of his life and liberty without due process of law in violation of Article V of the amendments to the Constitution of the United States of America.

90. Because the three-judge court erred in erroneously construing the case of Nye and Mayers vs. United States of America, decided by the Supreme Court of the United States on April 10, 1941 and reported in ..... U.S. ....., 61 Sup. Ct. Rep. 810; 85 L. Ed. 733; 744 and in drawing unreasonable and unwarranted inferences therefrom, and in holding that said decision was not applicable to this proceeding.

91. Because the three-judge court erred in finding, holding and concluding that this defendant and the other defendants "sent their messengers (their innocent and unsuspecting messengers) to the very courtroom and into open court", said finding being unsupported by any evidence in the record in this cause and contrary to the evidence in the record in this cause.

92. Because the three-judge court erred in finding, holding and concluding in its opinion that the alleged "misbehavior of these defendants was committed, where it took effect and where it was intended to take effect"; said finding, holding and conclusion being unsupported by any evidence in the record in this proceeding, and contrary to any evidence in the record in this proceeding.

93. Because the three-judge court erred in its opinion in failing and refusing to consider the contention of this defendant that a three-judge court had no jurisdiction, power or authority to entertain this proceeding in crimi-
[fol. 209] nal contempt.

94. Because the three-judge court erred in finding, holding and concluding in its opinion that the alleged "whole transaction was for the express purpose of effecting a settlement of the insurance litigation;" said finding, holding and conclusion being unsupported by any evidence in the record in this cause and contrary to the evidence in the record in this cause.

95. Because the three-court judge erred in its deduction that the facts allegedly proved that there was a conspiracy between Street, O'Malley, McCormack and this defendant to obtain decrees disposing of the impounded fund, for the reason that said purported finding, conclusion and deduction is contrary to the pleadings, unsupported by the evidence, and contrary to the evidence.

96. Because the three-judge court erred in its opinion in this cause in holding that the prosecution herein was not barred by the statute of limitations, for each and all of the following reasons; (1) because it appears from the face of the information herein that said prosecution against this defendant is barred by the statute of limitations; (2) because under the evidence in the cause it appears that said prosecution is barred by the statute of limitations; (3) because each and all of the three-judge court's findings with reference to the statute of limitations are unsupported by the evidence and contrary to the undisputed evidence; (4) because it affirmatively appears from the evidence that the theory upon which the three-judge court held that the statute of limitations did not apply was erroneous in law and unsupported by the evidence.

97. Because the three-judge court erred in holding, finding and concluding that the alleged deception of this defendant and the other defendants continued the alleged misbehavior far beyond the actual entry of the decree in the insurance rate litigation, for the reason that said find-
[fol. 210] ing is unsupported by the evidence and is contrary to the undisputed evidence, and is erroneous in law.

98. Because the three-judge court erred in finding in its opinion that this defendant and the other defendants committed particular acts of "supplemental deception", said finding being unsupported by any evidence in the record in this cause and contrary to the evidence.

99. Because the three-judge court erred in its purported findings in its opinion to the effect that McCormack committed perjury before the Grand Jury, and that said alleged perjury was committed as a result of an agreement between the defendants and was an affirmative act of deception, for the reason that said purported finding is unsupported by the evidence, is an erroneous conclusion, which is contrary to the evidence.

100. Because the three-judge court erred in finding and concluding that it could be reasonably inferred that this defendant and the other defendants had entered into an agreement with reference to McCormack's testimony before said Grand Jury, for the reason that said purported inference is unwarranted by the evidence, is contrary to the evidence, and was affirmatively destroyed

by the undisputed and uncontradicted evidence offered on behalf of the Government.

101. Because the three-judge court erred in its opinion in holding, concluding and finding that the alleged acts of the defendant were calculated to stir the Court's resentment and anger, and that the stirring of the Court's resentment and anger was the actual offense allegedly committed by this defendant and the other defendants, for the reason that said finding is erroneous in law, unsupported by the evidence, and contrary to the evidence.

102. Because the three-judge court erred in finding, holding and concluding that "There is no statute of limitations applicable to contempt committed 'in the presence [fol. 211] of the Court' ", for the reason that said statement is an erroneous conclusion of law, and for the further reason that it affirmatively appears from the evidence in this cause that there was no contempt committed in the presence of the Court.

103. Because the three-judge court erred in finding, holding and concluding in its opinion that the statute of limitations did not begin to run in this case until the alleged deception practiced by the defendants ceased to have effect, nor until the last alleged affirmative act fortifying the alleged deception was committed by the alleged conspirators or any of them, nor until the essence of the alleged contempt became an active principle by the alleged discovery of the truth, said conclusion being erroneous in law and unsupported by any evidence in the record, and being contrary to the evidence in the record.

104. Because the three-judge court erred in its opinion in holding that this defendant had not been subjected to double jeopardy by reason of the previous prosecution and acquittal of this defendant in Causes No. 14912 and 14932 in the District Court of the United States entitled United States of America, plaintiff, vs. Thomas J. Pendergast, R. E. O'Malley and A. L. McCormack, defendants, for the reason that said purported finding that the maintenance of this prosecution did not constitute double jeopardy is contrary to the undisputed evidence, and the conclusions of the Court in connection therewith are unsupported by the evidence, erroneous in law, and contrary to the record entries, verdicts and judgment in the causes hereinabove mentioned.

105. Because the three-judge court erred in its opinion in purporting to find that the agreement between the United States of America and this defendant, made and entered into prior to the entering of the plea of guilty in the income tax case mentioned in evidence, did not en- [fol. 212] title the defendant to a dismissal of this cause, for the reason that said finding is contrary to the terms and provisions of said agreement, contrary to the undisputed evidence in the cause, contrary to the judicial admissions made by the Government in the trial of this cause in open court, and contrary to the stipulations shown in the record in this cause.

106. Because the three-judge court erred in its opinion by finding, holding and concluding that the United States District Attorney only made known the agreement not to further prosecute this defendant at the instance and request of counsel for this defendant and the other defendants, and until after this defendant had been sentenced, and the term had passed, and after sentence could not be changed, and in purportedly finding that said United States District Attorney did not intend or contemplate that said agreement would extend to this proceeding in contempt, for the reason that said finding is contrary to the undisputed evidence in the cause and is unsupported by any evidence, and constitutes an unwarranted purported interpretation of the agreement shown by the evidence.

107. Because the three-judge court erred in finding, holding and concluding that this defendant and the other defendants "did everything conceivably possible to be done to avoid trial" under indictments returned in causes entitled United States of America, plaintiff, vs. Thomas J. Pendergast, R. E. O'Malley and A. L. McCormack, defendants, No. 14912 and 14932, in the District Court of the United States for the reason that said finding is unsupported by any evidence in the record, and contrary to the evidence.

108. Because the three-judge court erred in the following rulings upon the evidence (which said rulings were made and entered by the three-judge court on June 7, 1941):

In admitting over the objection and exception of this de- [fol. 213] fendant, in failing and refusing to strike and refusing to limit as to this defendant testimony of A. L.

McCormack contained in pages 38 to 78 of the transcript of the record in this cause.

109. The court erred in its formal judgment of conviction and sentence rendered on June 7, 1941, in adding to the title of cause No. 5,040 on the criminal docket of the Central Division of the Western District of Missouri, the notation that such cause was to be additionally entitled incidental to causes 270 to 426 in equity, when in fact, this cause could not be in any manner incidental to said causes in equity, and said finding and order is prejudicially erroneous.

110. Because the three-judge court erred in its opinion and in the conclusion thereof in finding this defendant guilty, and in its judgment entered herein for each and all of the reasons hereinabove stated, which said reasons are here reassigned with the same force and effect as if again set out herein.

111. The three-judge court erred in making purported findings of fact in its opinion, which said purported findings of fact were erroneous, misleading, and confusing and inconsistent with, and not supported by any evidence in the record in this cause, and containing conclusions of law not supported by the evidence, and not predicated upon the evidence, said findings of fact serving no lawful or proper procedural function in a prosecution for criminal contempt.

112. The three-judge court erred in overruling defendant's motion for new trial and each separate assignment therein.

[fol. 214] WHEREFORE, by reason whereof and on account of the grounds of appeal above assigned and cited, and of which complaint is herein made, defendant, Robert Emmett O'Malley, prays that the judgment and sentence of the court entered against defendant herein be reversed, set aside and for naught held.

James P. Aylward
George V. Aylward
Terence M. O'Brien
Ralph M. Russell
Attorneys for Robert Emmett O'Malley

Filed in the United States District Court June 7, 1941

[fol. 215] (Notice of Notice of Appeal of Defendant, Robert Emmett O'Malley, and Acknowledgment of Service.)

In the District Court of the United States of America for the Central Division of the Western District of Missouri. United States of America, Plaintiff, vs. Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack, Defendants. No. 5,040 a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

Before KIMBROUGH STONE, Circuit Judge, ALBERT L. REEVES and MERRILL E. OTIS, District Judges.

To the UNITED STATES OF AMERICA, the above named plaintiff, or Maurice M. Milligan, United States District Attorney for the Western District of Missouri:

You, and each of you, are hereby notified that Robert Emmett O'Malley, the above named defendant, has appealed to the United States Circuit Court of Appeals for the Eighth Circuit, from the judgment of conviction rendered in this cause; and from the sentence and punishment imposed by the aforesaid court pursuant thereto; as well as from all such other actions, rulings and orders of the aforesaid court, in this cause, and of which complaint is specifically made in separate motions for a new trial and assignment of errors, in this cause; and you and each of you are hereby notified that said appeal is made and rendered returnable within days hereafter in the United States Circuit Court of Appeals for the Eighth Circuit, in the city of Saint Louis, Missouri.

James P. Aylward
Geo. V. Aylward
Terence M. O'Brien
Ralph M. Russell
Attorneys for Robert Emmett O'Malley

[fol. 216] I hereby, this June 7th, 1941, acknowledge service of the above and foregoing notice of appeal; and further acknowledge receipt of copy thereof, as well as a

copy of the motion for a new trial, to which reference is made therein.

Richard K. Phelps

For the United States District Attorney for the Western District of Missouri

Filed in the United States District Court June 7, 1941

(Duplicate Notice of Appeal of Defendant, Robert Emmett O'Malley Filed in Appellate Court.)

The Duplicate Notice of Appeal of the Defendant, Robert Emmett O'Malley, was filed in the United States Circuit Court of Appeals on June 27, 1941, but same is omitted from the printed record at this place to avoid duplication inasmuch as the Notice of Appeal on behalf of the Defendant Robert Emmett O'Malley which was filed in the District Court heretofore appears in this printed record at folio page 190.

[fol. 217] (Cost Bond on Appeal of Defendant, Robert Emmett O'Malley.)

KNOW ALL MEN BY THESE PRESENTS, that we, Robert Emmett O'Malley, as principal, and National Surety Corporation, as surety, are held and firmly bound unto the United States of America, in the full and just sum of Two Hundred Fifty ($250.00) Dollars, for the payment of which, well and truly to be made, we bind ourselves, our executors, administrators, successors, assigns and representatives, jointly and severally by these presents.

The condition of said bond is such that,

WHEREAS, lately, at a term of the statutory District Court of the United States for the Central Division of the

Western District of Missouri, in a suit pending in said court wherein United States of America was plaintiff and Robert Emmett O'Malley was one of the defendants, a judgment of conviction and sentence was rendered against defendant on June 7, 1941, from which defendant has taken an appeal to the United States Circuit Court of Appeals for the Eighth Circuit;

NOW THEREFORE, if the said Robert Emmett O'Malley shall prosecute his appeal with effect and, if he fails to make his plea good, shall pay all costs which may ac- [fol. 218] crue or be assessed against him by said Court or pursuant to order of said Court on account of such appeal, then the above obligation to be void, otherwise to remain in full force and effect.

Dated at Kansas City, Missouri, this 7th day of June, 1941.

Robert Emmet O'Malley
Principal
National Surety Corporation
By G. B. Howland (Seal)
Attorney-in-fact
Surety

Approved as to Form.

Richard K. Phelps
Asst United States District Attorney

Approved:

Circuit Judge
Albert L. Reeves
District Judge

District Judge

Filed in the United States District Court June 7, 1941

[fol. 219] (Citation on Appeal by Defendant, Robert Emmett O'Malley.)

In the District Court of the United States of America for the Central Division of the Western District of Missouri. United States of America, Plaintiff, vs. Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack, Defendants. No. 5,040. a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

Before KIMBROUGH STONE, Circuit Judge, ALBERT L. REEVES and MERRILL E. OTIS, District Judges.
UNITED STATES OF AMERICA----SS.

To: The United States of America and MAURICE M. MILLIGAN, United States Attorney for the Western District of Missouri,

GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Eighth Circuit, to be held at the City of Saint Louis, Missouri, on the 7th day of July, 1941, pursuant to an order allowing an appeal and notice of appeal filed and entered in the District Court of the United States of America for the Central Division of the Western District of Missouri, from a judgment signed, sealed and entered on the 7th day of June, A.D., 1941, in that certain cause, being criminal cause No. 5,040, and entitled United States of America (Appellees) vs. Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack, Defendants (and Appellants), to show cause, if any there be, why the judgment rendered against the said appellants, as in said order allowing appeal and as in said notice of appeal mentioned, should not be corrected and why justice should [fol. 220] not be done in that behalf.

WITNESS The Honorable Kimbrough Stone, Judge, United States Circuit Court of Appeals, Eighth Circuit; The Honorable Albert L. Reeves, Judge, United States District Court, Western District of Missouri, Eighth Circuit; The Honorable Merrill E. Otis, Judge, United States District Court, Western District of Missouri, Eighth Cir-

cuit, this 7th day of June, A.D., 1941, and of the Independence of the United States 165.

Kimbrough Stone
United States Circuit Judge
Albert L. Reeves
United States District Judge
Merrill E. Otis
United States District Judge

Service acknowledged above date

Richard K. Phelps, Asst U. S. Atty
By Charles F. Lamkin, Jr., Asst U. S. Atty

Filed in the United States District Court June 7, 1941

[fol. 221] (Petition for Appeal by Defendant, Robert Emmett O'Malley.)

To: The Honorable Kimbrough Stone, Circuit Judge,
The Honorable Albert L. Reeves, District Judge,
The Honorable Merrill E. Otis, District Judge.

Comes now defendant, Robert Emmett O'Malley, and respectfully shows that on June 7, 1941, a judgment of conviction of contempt of this court was rendered against him, and sentence was rendered against him herein.

That your petitioner feels himself aggrieved by said judgment and sentence entered thereon, as aforesaid, and petitions the court for an order allowing him to prosecute an appeal, and allowing him an appeal, to the United States Circuit Court of Appeals, for the Eighth Circuit, under the laws of the United States of America in such cases made and provided.

WHEREFORE, the premises considered, your petitioner prays that an appeal be ordered and allowed from said judgment, and every part thereof, to the United States Circuit Court of Appeals for the Eighth Circuit, for the reasons set forth in the Assignment of Errors herein, and that said appeal be allowed your petitioner to the United States Circuit Court of Appeals, as aforesaid, for the cor-
[fol. 222] rection of errors complained of; that citation

be issued as provided by law; that a transcript of the record, proceedings and exhibits, upon which said judgment was based, duly authenticated, to be sent to the said Circuit Court of Appeals, under the rules of said court, in such cases made and provided; and that your petitioner be granted a supersedeas and stay of execution of proceedings and sentence, pending the determination of said appeal, and that proper order relating to securities to be required of your petitioner be made.

James P. Aylward
Geo. V. Aylward
Terence M. O'Brien
Ralph M. Russell
Attorneys for Robert Emmett O'Malley

Filed in the United States District Court June 7, 1941

[fol. 223] (Assignment of Errors of Defendant, Robert Emmett O'Malley.)

In the District Court of the United States of America for the Central Division of the Western District of Missouri. United States of America, Plaintiff, vs. Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack, Defendants. No. 5,040 a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

Before KIMBROUGH STONE, Circuit Judge, ALBERT L. REEVES and MERRILL E. OTIS, District Judges.

Comes now the above named defendant, Robert Emmett O'Malley, and in connnection with his appeal herein, which has heretofore been taken in this cause on the 7th day of June, 1941, and makes the following assignment of errors, which he avers accrued and occurred upon the proceedings and the trial of this cause and upon which he relies to set aside and reverse the judgment and sentence heretofore rendered and entered herein, as appears of record herein:

[fol. 224] 1. Because the three-judge court erred in failing to hold that under the pleadings, the law and the evidence, this defendant was not shown to be guilty of the offense sought to be charged in this proceeding.

2. Because under the pleadings, the law and the evidence, this defendant is entitled to judgment and the three-judge court erred in failing to render judgment on behalf of this defendant.

3. Because the three-judge court erred in failing to find the defendant not guilty of contempt of court under the pleadings, the law and the evidence.

4. Because the three-judge court erred in not finding under the pleadin s, the law and the evidence, that this defendant was not shown to be guilty of contempt which this three-judge court had power or authority to punish.

5. Because the three-judge court was without jurisdiction to entertain, hear or determine this proceeding and erred in not so holding.

6. Because the three-judge court erred in assuming jurisdiction to entertain, hear or determine this proceeding in contempt, or to try to convict this defendant of the defense sought to be charged.

7. Because the three-judge court erred in assuming jurisdiction to punish this defendant for the alleged contempt sought to be charged.

8. Because the three-judge court was illegally convened at the inception of the insurance rate litigation mentioned in evidence (American Insurance Co. vs. Joseph B. Thompson, Superintendent of Missouri, et al., No. 270 in Equity, and companion cases bearing Docket Nos. 271 to 426, incl.) and did not lawfully acquire jurisdiction therein.

[fol. 225] 9. Because the three-judge court was without jurisdiction to entertain, consider, approve or disapprove the purported settlement or stipulation of settlement of the insurance rate litigation mentioned in evidence, and erred in assuming, undertaking or entertaining such jurisdiction.

10. Because the three-judge court was without jurisdiction to disburse or supervise the disbursement of impounded funds mentioned in evidence.

11. Because the purported settlement of the insurance rate litigation mentioned in evidence was a nullity and

not susceptible of approval or enforcement by the three-judge court, and the three-judge court erred in holding that said matter was within its jurisdiction.

12. Because, if the three-judge court acquired jurisdiction of the insurance rate litigation mentioned in evidence (which this defendant denies) under the colorable averments of the bills filed, such jurisdiction was lost prior to the proceedings in said litigation relating to the purported settlement thereof; and that said three-judge court thereafter had no power or authority under the law to act therein.

13. Because, prior to the proceeding in the insurance rate litigation relating to the purported settlement ther of, the three-judge court and the litigants in said insurance rate litigation recognized the constitutionality of the State statutes assailed in the bills in equity therein, and were proceeding solely upon the theory that the action of the Superintendent of Insurance of the State Of Missouri under constitutional statutes was confiscatory; as a result, any jurisdiction it may have theretofore acquired was thereupon lost and the three-judge court erred in proceeding thereafter, and was acting contrary to the terms and provisions of the Statutes of the United States authorizing the calling of a three-judge court.

[fol. 226] 14. Because the three-judge court under the statutes in such cases made and provided, could have acquired no jurisdiction in the insurance rate litigation mentioned in evidence other than to grant or deny injunctive relief sought on the ground of the unconstitutionality of a State statute or State statutes; and that in purportion to entertain, hear, consider, approve and enforce the purported settlement of said insurance rate litigation, in whole or in part, the three-judge court was acting extrajudicially and its action was a nullity and void; and the three-judge court erred in continuing to assert jurisdiction thereafter.

15. Because the bills in equity filed by the insurance companies in the insurance rate litigation mentioned in evidence failed to state a cause of action, were not petitions or bills to review the action of the Superintendent of Insurance complained of, did not justify or authorize injunctive relief by the three-judge court, were insufficient to authorize the creation or formation of a three-judge court, and said three-judge court sought to be con-

vened, acquired no lawful jurisdiction and said three-judge court erred in asserting jurisdiction or [prodeeding] in said causes.

16. Because the three-judge court erred in charging this defendant with notice of the terms of the purported settlement, or that said purported settlement would be reduced to a written agreement and presented to the three-judge court for its approval, or that said three-judge court would act thereon, when such settlement was a nullity and when said three-judge court was without jurisdiction or authority to act thereon.

17. Because the three-judge court erred in asserting jurisdiction to direct the disbursement of the impounded funds mentioned in evidence in accordance with the purported settlement of said insurance rate litigation, or in taking any action thereon.

[fol. 227] 18. Because the three-judge court at the time of the alleged contempt charge herein was not a lawfully constituted court or exercising any lawful or constitutional or statutory jurisdiction, and its proceedings were erroneous and extrajudicial.

19. Because at the time of the institution of this proceeding, the three-judge court was not a lawfully constituted court or exercising any lawful or constitutional jurisdiction, and the three-judge court erred in attempting to assert jurisdiction herein.

20. Because the three-judge court, convened as a court of limited statutory jurisdiction; was without authority or jurisdiction to entertain, hear or determine this proceeding.

21. Because this proceeding was and is an independent action at law and not a part of the original proceeding in equity over which the three-judge court was attempting to assert jurisdiction; and said three-judge court therefore was without jurisdiction herein.

22. Because this proceeding is a prosecution for alleged criminal contempt and the three-judge court is vested with no jurisdiction thereover.

23. Because this proceeding was neither instituted nor maintained for the benefit of any litigant in the insurance rate litigation mentioned in evidence, or to coerce or compel obedience to any order, ruling, decree, or other purported exercise of jurisdiction by the three-judge court

in, said litigation, but solely to punish for past acts allegedly [contmeptuous] of said three-judge court, and said three-judge court, vested at most with jurisdiction (which defendant denies) for limited purposes in said original proceeding in equity, was without jurisdiction, power or authority so to punish.

24. Because, if this proceeding could lawfully be maintained (which this defendant denies), jurisdiction therein was vested in the District Court for the Central Division of the Western District of Missouri, presided over by Honorable John C. Collet, District Judge, and not in the [fol. 228] three-judge court which purported to exercise jurisdiction in this cause.

25. Because the information filed herein fails to state a cause of action against this defendant.

26. Because the information filed in this proceeding shows upon its face that it is barred by the statute of limitations and that the alleged contemptuous acts asserted therein occurred more than three years next before the institution of said proceeding.

27. Because the information shows that the alleged contemptuous acts sought to be charged against this defendant could not and did not constitute (a) contempt of court, (b) contempt of said three-judge court, (c) contempt of said three-judge court which said three-judge court had power, jurisdiction or authority to punish, or (d) contempt of said three-judge court, which said three-judge court had power or jurisdiction or authority to punish by summary process or by any procedure other than indictment.

28. Because the information shows upon its face that the three-judge court was without jurisdiction in this action.

29. Because the maintenance of this prosecution subjected this defendant to double jeopardy in violation of the Fifth Amendment to the Constitution of the United States, in that this defendant had heretofore been prosecuted for the alleged offense or offenses sought to be charged in this proceeding under the indictments mentioned in evidence (United States vs. Thomas J. Pendergast, R. E. O'Malley and A. L. McCormack, No. 14912 and 14932, in the District Court of the United States for the Western Division of the Western District of Missouri), which said indictments were duly consolidated for trial

and a jury duly impaneled and sworn and the United States thereafter dismissed said indictments and this defendant was acquitted and discharged thereunder, thereby having been acquitted of the offense or offenses charged [fol. 229] in this proceeding; and the three-judge court erred in failing to so hold.

30. Because this defendant has been prosecuted by the United States for the alleged offense or offenses sought to be charged in this proceeding under the indictments mentioned in evidence, which said indictments were consolidated for trial and a jury duly impaneled and sworn, and the United States thereafter dismissed said indictments and this defendant was acquitted and discharged thereunder, thereby having been acquitted of the offense or offenses sought to be charged in the information herein.

31. Because under the evidence it appears that this prosecution was barred by the statute of limitations and that said prosecution was not instituted or the information filed within three years next after the occurrence of the alleged contemptuous acts, and the three-judge court erred in failing to so find.

32. Because the evidence on the trial before the three-judge court failed to show (a) that defendant was guilty of the offenses charged or sought to be charged; (b) that the defendant was guilty of contempt of court; (c) that the defendant was guilty of contempt of said three-judge court; (d) that defendant was guilty of contempt of said three-judge court, which said three-judge court had power or authority to punish; (e) that defendant was guilty of contempt of said three-judge court, which said three-judge court had power or authority to punish by summary process or by procedure other than indictment; and the said three-judge court erred in failing so to find.

33. Because the acts charged against defendant and shown by the evidence did not constitute (a) contempt, (b) contempt of the three-judge court, (c) contempt of the three-judge court, which said three-judge court had power or authority to punish, (d) contempt of said three-[fol. 230] judge court, which said three-judge court had power or authority to punish in this proceeding or otherwise than by indictment.

34. Because the evidence failed to show that this defendant was guilty of any act in law contemptuous of the three-judge court; and said three-judge court erred in failing to find the defendant not guilty.

35. Because this defendant could not properly be charged with the act or acts of others in allegedly inducing action on the part of the three-judge court, or expressly or by implication perpetrating a fraud upon said three-judge court when there was no evidence that this defendant was a party thereto or knew or anticipated that any action would or was to be thus induced or any fraud so perpetrated; and no conspiracy was charged in the information or shown by the evidence; and the three-judge court erred in charging this defendant with any act or acts of others in said particulars.

36. Because the evidence failed to show this defendant guilty beyond a reasonable doubt; and the three-judge court erred in its finding of guilt.

37. Because the character of the Government's proof was such as to be insufficient to warrant a finding of guilt beyond reasonable doubt; and the three-judge court erred in so finding.

38. Because this prosecution was barred by reason of the agreement not to prosecute shown in the evidence, which said agreement was made between this defendant and the United States whereby and whereunder this defendant entered a plea of guilty mentioned in evidence in the income tax case mentioned in evidence, and served the sentence thereupon imposed; and the three-judge court erred in failing to find that said prosecution was barred by reason of said agreement, and in purporting to find that said prosecution was not barred by reason of said agreement.

[fol. 231] 39. Because the members of the three-judge court who purported to act in this cause were in fact disqualified in said proceeding, and in acting therein deprived this defendant of liberty and property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

40. Because there was no evidence that this defendant was a party to the actual settlement agreed upon in the insurance rate case or to any act or acts of others in connection with such settlement, or in the approval there-

of; and the three-judge court erred in making each finding made in connection therewith.

41. Because there was no evidence in this cause that this defendant participated in any act or acts contemptuous of the three-judge court, or was chargeable with any intent or design so to do.

42. Because there was no evidence that this defendant was a party directly or indirectly to the compromise or settlement of the insurance rate litigation actually executed; and the three-judge court erred in its findings in connection therewith.

43. Because there was no evidence that this defendant was a party directly or indirectly to the stipulation of settlement mentioned in evidence; and said three-judge court erred in its finding with reference thereto.

44. Because there was no evidence that this defendant was a party directly or indirectly to any presentation of the stipulation of settlement mentioned in evidence, to the three-judge court for its approval (if there was evidence that such a settlement was presented for approval, which defendant denies), or to the motion for decree mentioned in evidence, or to any action taken to obtain the approval of said three-judge court to said stipulation, or to induce any action on the part of said three-judge court with reference thereto; if there is evidence of any such action, which defendant denies; and the three-judge court erred in its finding in connection therewith.

[fol. 232] 45. Because there was no evidence that there was any agreement between the defendants herein and Charles R. Street or between this defendant or any of the other defendants to the effect that they or any of them would keep the alleged transactions between them unknown to, or concealed from the said three-judge court, or that by affirmative acts of concealment or silence they or any of them would prevent said three-judge court from obtaining knowledge or information with reference thereto; and the evidence of the Government in the trial of said cause was affirmatively to the contrary; and that by reason thereof the Government cannot rely upon any inference or presumption with reference to any such alleged agreement; and the Government is entitled to no such inference or presumption for the further reason that the evidence was undisputed that this defendant was not a party to any such agreement of any kind or character;

and by reason of the facts aforesaid, the three-judge court erred in making its findings that there was such agreement, its finding of guilt and in making each all of its findings in connection with such alleged agreements.

46. Because there was no evidence that any concealment by A. L. McCormack before the United States Grand Jury of any facts relating to the settlement of the insurance rate litigation mentioned in evidence, if there was evidence of any such concealment, which defendant denies, was in furtherance of, or pursuant to any agreement whatsoever, and particularly to any agreement to which this defendant was ever a party; and the evidence of the Government affirmatively disproved any such contention; and that by reason thereof, the three-judge court erred in failing to find the defendant not guilty, and in failing to find that this action was barred by the statute of limitations; and further erred in making each and every finding which was made by said three-judge court in connection with said alleged Grand Jury testimony.

[fol. 233] 47. Because there was no evidence that any alleged communication between the defendant R. E. O'Malley and defendant A. L. McCormack during the course of the grand jury inquiry mentioned in evidence was at the instance or request of this defendant, or pursuant to, or in furtherance of any agreement to which this defendant was a party; and the three-judge court erred in making its finding of guilt and in failing to hold that this action was barred by the statute of limitations; and further erred in the making of each finding made in connection with said alleged communication or communications.

48. Because there was not sufficient evidence to warrant a finding of guilt against this defendant; and the three-judge court erred in making such finding.

49. Because there was no evidence sufficient to establish the offense charged or sought to be charged; and the three-judge court erred in connection with each and every finding made in connection therewith.

50. Because there was no evidence sufficient to establish that this defendant was a party to any act contemptuous of the three-judge court; and the three-judge court erred in making its finding of guilt.

51. Because the evidence of the Government, binding upon the Government, affirmatively established the non-

participation of this defendant in any act allegedly contemptuous of the three-judge court; and the three-judge court erred in failing to so find.

52. Because there was no evidence sufficient to establish the necessary elements and ingredients of the offense sought to be charged; and the three-judge court erred in making its finding of guilt.

53. Because there was no evidence sufficient to establish any offense on the part of this defendant committed within the jurisdiction of the three-judge court; and the three-judge court erred in making its finding of guilt for said reason.

[fol. 234] 54. Because there was no evidence sufficient to establish criminal intent on the part of this defendant; and the three-judge court erred in failing so to find.

55. Because there was no evidence sufficient to establish contemptuous intent upon the part of this defendant; and the three-judge court erred in its finding of guilt.

56. Because there was no evidence sufficient to establish that this defendant was guilty of [misbehaivor] in the presence of the three-judge court, or so near thereto as to obstruct the administration of justice; and the three-judge court erred in finding this defendant guilty.

57. Because the three-judge court erred in overruling and denying and failing to sustain the motion of this defendant to abate and quash the information filed in said three-judge court, and to withdraw the rule to show cause for each and all of the reasons therein appearing.

58. Because the three-judge court erred in overruling and denying, and in failing to sustain the motion of this defendant at the close of the evidence of the United States to declare this defendant not guilty and to dismiss this proceeding, for each and all of the reasons therein appearing, and for each and all of the grounds therein stated.

59. Because the three-judge court erred in overruling and denying, and failing and refusing to sustain the motion of this defendant at the close of all the evidence to declare this defendant not guilty, and to dismiss this proceeding, for each and all of the reasons contained in said motion.

60. Because the three-judge court erred in admitting and receiving, over the objection and exception of this defendant, incompetent, irrelevant and immaterial evidence.

[fol. 235] 61. Because the three-judge court erred in excluding, over the exceptions of this defendant, competent, material and relevant evidence duly offered by this defendant.

62. Because the three-judge court erred in overruling and failing and refusing to sustain motions to strike incompetent, irrelevant and immaterial evidence, which said motions were duly made by this defendant.

63. Because the three-judge court erred in overruling, and in failing and refusing to sustain motions duly made by this defendant to limit and restrict the effect of purported evidence.

64. Because the findings, opinions and judgment of the three-judge court are against the law and the evidence.

65. Because the findings, opinions and judgment of the three-judge court, and each part thereof, are unsupported by substantial evidence.

66. Because the findings, opinions and judgment of the three-judge court are against the greater weight of the evidence.

[fol. 236] 67. Because the three-judge court erred in failing and refusing to declare this defendant not guilty for each of the reasons specified in the motion of this defendant filed at the close of all the evidence, to [declare] this defendant not guilty and to dismiss the proceedings.

68. Because the three-judge court erred in making and entering its first finding of fact (which said finding is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside the record of this cause, which said finding was made over the objection and exception of this defendant.

69. Because the three-judge court erred in making and entering its second finding of fact (which said finding of fact is contained in its opinion) for the reason that said

finding is against the evidence, against the greater weight of the evidence, is unsupported by any evidence and is predicated upon alleged matters and facts outside the record in this cause; and for the further reason that it contains broad and sweeping conclusions of law not predicated upon any evidence in the cause, which said finding was made over the objection and exception of this defendant.

70. Because the three-judge court erred in making and entering, over the objection and exception of this defendant, its third finding of fact (which said finding is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence and is predicated upon alleged matters and facts outside of the record in this cause; and for the further reason that it contains broad and sweeping conclusions of law not predicated upon any evidence in the cause.

[fol. 237] 71. Because the three-judge court erred in making and entering its third finding of fact for the reason that said finding of fact purports to find that this defendant and the other defendants entered into a conspiracy to present to the three-judge court in open court a purportedly fake settlement and to grossly deceive said three-judge court by the alleged lying, false and fraudulent representations allegedly made in open court at the instance of defendant, which said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, or any evidence, and is predicated upon alleged matters and facts outside the record in this cause, and contains broad and general conclusions of law not predicated upon any evidence in this cause, and was made over the objection and exception of this defendant.

72. Because the three-judge court erred in making and entering, over the objection and exception of this defendant, its fourth finding of fact (which said finding is contained in its opinion), for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside the record in this cause; and for the further reason that said finding contains broad and general conclusions of law not predicated upon any evidence in this cause.

73. Because the three-judge court erred in making, over the objection and exception of this defendant, each and every finding of fact made by said Court, whether made in said formal findings of fact or elsewhere in said opinions, or made in its judgment of conviction for the reason that each of said findings is contrary to the evidence, is contrary to the greater weight of the evidence, is unsupported by substantial evidence, is predicated upon alleged matters and facts outside the record in the cause; [fol. 238] and for the reason that each of said findings contains erroneous conclusions of law, not predicated upon any evidence in the cause.

74. Because the three-judge court erred in each and all of its conclusions of law.

75. Because the three-judge court erred in holding in its opinions that it possessed jurisdiction to entertain this proceeding in criminal contempt.

76. Because the three-judge court erred in its opinion, findings and judgments of conviction that it possessed jurisdiction to punish for the alleged criminal contempt sought to be charged in the information herein.

77. Because the three-judge court erred in holding in its findings, opinions and judgment that any acts of this defendant constituted contempt of said three-judge court.

78. Because the three-judge court erred in holding that any acts of this defendant shown by the evidence constituted contempt of said court, punishable by said court in this proceeding.

79. Because the three-judge court erred in its findings, opinions and judgment that this proceeding was incidental or ancillary to the so-called insurance rate litigation causes, and in failing to find that this proceeding was an independent proceeding for prosecution for criminal contempt.

80. Because the three-judge court erred in holding that this proceeding entitled United States of America vs. Thomas J. Pendergast, et al., No. 5040, an action in criminal contempt, was incidental or ancillary to the so-called insurance rate litigation which was a proceeding in equity.

81. Because the three-judge court erred in failing and refusing to hold that a statutory three-judge court is without jurisdiction to entertain, hear or determine a prosecution for criminal contempt initiated on informa-

[fol. 239] tion on the part of the United States against this defendant.

82. Because the three-judge court erred in its opinion in this cause in purporting to find in the first footnote to said opinion that this action was a proceeding incidental to American Insurance Co., et al., vs. [Thomspon], In Equity No. 270, when in fact this proceeding in contempt entitled United States of America, vs. Thomas J. Pendergast, et al., was a separate, independent criminal proceeding between the United States of America, plaintiff, and Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, defendants, and was numbered 5040, said number being a number assigned to this cause on the criminal docket of the Central Division of the District Court of the United States for the Western District of Missouri, presided over by the Honorable John C. Collet, District Judge.

83. Because the three-judge court erred in its opinion in holding that bribery was committed by this defendant or any of these defendants, or that political influence was brought to bear by the payment to this defendant of $440,000 for the reason that said purported finding and said statement is unsupported by any evidence in the record in this cause, and is contrary to the evidence.

84. Because the three-judge court erred in finding in its opinions that these defendants, allegedly conspirators, committed acts in open court in the presence and face of the Court grossly to deceive and hoodwink the Judges constituting the Court, said findings being unsupported by any evidence in the record in this cause, and contrary to the evidence; and if said finding was published in said opinions as a conclusion of law, said conclusion is erroneous and not predicated upon any evidence in the record.

85. Because the three-judge court erred in holding, finding and concluding in its opinions that this defendant or these defendants "prostituted the Court to their [fol. 240] venal purposes and exposed its Judges to the possibility of [disgrase] and to certain humiliation," said finding, holding and conclusion being unsupported by any evidence in the record of this cause and contrary to any evidence in the record of this cause.

86. Because the three-judge court erred in finding, holding and concluding that these defendants never denied that they were guilty of the alleged misbehavior, and in purporting to predicate a finding of guilt upon said alleged absence of a denial for the reason that said finding is not supported by the evidence, is contrary to the evidence and the pleadings in this cause, and ignores the issues.

87. Because the three-judge court erred in finding, holding and concluding in its opinion that this defendant and other defendants "stood on their technicalities", and erred in finding these defendants guilty of contempt of said three-judge court on said ground, said finding, holding and conclusion being in violation of this defendant's constitutional right guaranteed to him by Article V of the amendments to the Constitution of the United States, which in part, provides as follows:

> "No person shall be * * * compelled in any criminal case to be a witness against himself * * *",

in that the finding of guilt in said cause is based and predicated upon the failure of this defendant to testify in said cause.

88. Because the three-judge court erred in making a purported finding in a footnote to its opinion as follows:

> "The whole history of the criminal cases which resulted in the imposition of sentences on Pendergast and O'Malley for attempted evasion of income taxes, including much which throws light upon the background of the present proceeding in contempt, is set out in United States vs. Pendergast and O'Malley, 28 Fed. Supp. 601"

for the reason that said purported finding is not based upon any evidence in this cause, is outside the record, and attempts to incorporated into this proceeding matters not [fol. 241] in issue.

89. Because the three-judge court erred in holding, finding and concluding in its opinion that this defendant confessed any alleged misbehavior or that this defendant had as well confessed any alleged misbehavior; said finding being unsupported by any evidence in the record, and contrary to any evidence in the record; and in basing its opinion of guilt upon said finding, the three-judge court

thereby deprived defendant of his life and liberty without due process of law in violation of Article V of the amendments to the Constitution of the United States of America.

90. Because the three-judge court erred in erroneously construing the case of Nye and Mayers vs. United States of America, decided by the Supreme Court of the United States on April 10, 1941 and reported in U.S. , 61 Sup. Ct. Rep. 810; 85 L. Ed. 733, 744 and in drawing unreasonable and unwarranted inferences therefrom, and in holding that said decision was not applicable to this proceeding.

91. Because the three-judge court erred in finding, holding and concluding that this defendant and the other defendants "sent their messengers (their innocent and unsuspecting messengers) to the very courtroom and into open court", said finding being unsupported by any evidence in the record in this cause and contrary to the evidence in the record in this cause.

92. Because the three-judge court erred in finding, holding and concluding in its opinion that the alleged "misbehavior of these defendants was committed, where it took effect and where it was intended to take effect"; said finding, holding and conclusion being unsupported by any evidence in the record in this proceeding, and contrary to any evidence in the record in this proceeding.

93. Because the three-judge court erred in its opinion in failing and refusing to consider the contention of this defendant that a three-judge court had no jurisdiction, power or authority to entertain this proceeding in crimi-
[fol. 242] nal contempt.

94. Because the three-judge court erred in finding, holding and concluding in its opinion that the alleged "whole transaction was for the express purpose of effecting a settlement of the insurance litigation;" said finding, holding and conclusion being unsupported by any evidence in the record in this cause and contrary to the evidence in the record in this cause.

95. Because the three-court judge erred in its deduction that the facts allegedly proved that there was a conspiracy between Street, O'Malley, McCormack and this defendant to obtain decrees disposing of the impounded fund, for the reason that said purported finding, conclusion and deduction is contrary to the pleadings, unsupported by the evidence, and contrary to the evidence.

96. Because the three-judge court erred in its opinion in this cause in holding that the prosecution herein was not barred by the statute of limitations, for each and all of the following reasons: (1) because it appears from the face of the information herein that said prosecution against this defendant is barred by the statute of limitations; (2) because under the evidence in the cause it appears that said prosecution is barred by the statute of limitations; (3) because each and all of the three-judge court's findings with reference to the statute of limitations are unsupported by the evidence and contrary to the undisputed evidence; (4) because it affirmatively appears from the evidence that the theory upon which the three-judge court held that the statute of limitations did not apply was erroneous in law and unsupported by the evidence.

97. Because the three-judge court erred in holding, finding and concluding that the alleged deception of this defendant and the other defendants continued the alleged misbehavior far beyond the actual entry of the decree in the insurance rate litigation, for the reason that said find-
[fol. 243] ing is unsupported by the evidence and is contrary to the undisputed evidence, and is erroneous in law.

98. Because the three-judge court erred in finding in its opinion that this defendant and the other defendants committed particular acts of "supplemental deception", said finding being unsupported by any evidence in the record in this cause and contrary to the evidence.

99. Because the three-judge court erred in its purported findings in its opinion to the effect that McCormack committed perjury before the Grand Jury, and that said alleged perjury was committed as a result of an agreement between the defendants and was an affirmative act of deception, for the reason that said purported finding is unsupported by the evidence, is an erroneous conclusion, which is contrary to the evidence.

100. Because the three-judge court erred in finding and concluding that it could be reasonably inferred that this defendant and the other defendants had entered into an agreement with reference to McCormack's testimony before said Grand Jury, for the reason that said purported inference is unwarranted by the evidence, is contrary to the evidence, and was affirmatively destroyed by the undisputed and uncontradicted evidence offered on behalf of the Government.

101. Because the three-judge court erred in its opinion in holding, concluding and finding that the alleged acts of the defendant were calculated to stir the Court's resentment and anger, and that the stirring of the Court's resentment and anger was the actual offense allegedly committed by this defendant and the other defendants, for the reason that said finding is erroneous in law, unsupported by the evidence, and contrary to the evidence.

102. Because the three-judge court erred in finding, holding and concluding that "There is no statute of limitations applicable to contempt committed 'in the presence [fol. 244] of the Court' ", for the reason that said statement is an erroneous conclusion of law, and for the further reason that it affirmatively appears from the evidence in this cause that there was no contempt committed in the presence of the Court.

103. Because the three-judge court erred in finding, holding and concluding in its opinion that the statute of limitations did not begin to run in this case until the alleged deception practiced by the defendants ceased to have effect, nor until the last alleged affirmative act fortifying the alleged deception was committed by the alleged conspirators or any of them, nor until the essence of the alleged contempt became an active principle by the alleged discovery of the truth, said conclusion being erroneous in law and unsupported by any evidence in the record, and being contrary to the evidence in the record.

104. Because the three-judge court erred in its opinion in holding that this defendant had not been subjected to double jeopardy by reason of the previous prosecution and acquittal of this defendant in Causes No. 14912 and 14932 in the District Court of the United States entitled United States of America, plaintiff, vs. Thomas J. Pendergast, R. E. O'Malley and A. L. McCormack, defendants, for the reason that said purported finding that the maintenance of this prosecution did not constitute double jeopardy is contrary to the undisputed evidence, and the conclusions of the Court in connection therewith are unsupported by the evidence, erroneous in law, and contrary to the record entries, verdicts and judgment in the causes hereinabove mentioned.

105. Because the three-judge court erred in its opinion in purporting to find that the agreement between the United States of America and this defendant, made and entered into prior to the entering of the plea of guilty in

the income tax case mentioned in evidence, did not en-
[fol. 245] title the defendant to a dismissal of this cause, for the reason that said finding is contrary to the terms and provisions of said agreement, contrary to the undisputed evidence in the cause, contrary to the judicial admissions made by the Government in the trial of this cause in open court, and contrary to the stipulations shown in the record in this cause.

106. Because the three-judge court erred in its opinion by finding, holding and concluding that the United States District Attorney only made known the agreement not to further prosecute this defendant at the instance and request of counsel for this defendant and the other defendants, and until after this defendant had been sentenced, and the term had passed, and after sentence could not be changed, and in purportedly finding that said United States District Attorney did not intend or contemplate that said agreement would extend to this proceeding in contempt, for the reason that said finding is contrary to the undisputed evidence in the cause and is unsupported by any evidence, and constitutes an unwarranted purported interpretation of the agreement shown by the evidence.

107. Because the three-judge court erred in finding, holding and concluding that this defendant and the other defendants "did everything conceivably possible to be done to avoid trial" under indictments returned in causes entitled United States of America, plaintiff, vs. Thomas J. Pendergast, R. E. O'Malley and A. L. McCormack, defendants, No. 14912 and 14932, in the District Court of the United States for the reason that said finding is unsupported by any evidence in the record, and contrary to the evidence.

108. Because the three-judge court erred in the following rulings upon the evidence (which said rulings were made and entered by the three-judge court on June 7, 1941):

In admitting over the objection and exception of this de-
[fol. 246] fendant, in failing and refusing to strike and refusing to limit as to this defendant testimony of A. L. McCormack contained in pages 38 to 78 of the transcript of the record in this cause.

109. The court erred in its formal judgment of conviction and sentence rendered on June 7, 1941, in adding

to the title of cause No. 5,040 on the criminal docket of the Central Division of the Western District of Missouri, the notation that such ause was to be additionally entitled incidental to causes 270 to 426 in equity, when in fact, this cause could not be in any manner incidental to said causes in equity, and said finding and order is prejudicially erroneous.

110. Because the three-judge court erred in its opinion and in the conclusion thereof in finding this defendant guilty, and in its judgment entered herein for each and all of the reasons hereinabove stated, which said reasons are here reassigned with the same force and effect as if again set out herein.

111. The three-judge court erred in making purported findings of fact in its opinion, which said purported findings of fact were erroneous, misleading, and confusing and inconsistent with, and not supported by any evidence in the record in this cause; and containing conclusions of law not supported by the evidence, and not predicated upon the evidence, said findings of fact serving no lawful or proper procedural function in a prosecution for criminal contempt.

112. The three-judge court erred in overruling defendant's motion for new trial and each separate assignment therein.

[fol. 247] WHEREFORE, by reason whereof and on account of the errors above assigned and cited, and of which complaint is herein made, defendant, Robert Emmett O'Malley, prays that the judgment and sentence of the court entered against defendant herein be reversed, set aside and for naught held.

James P. Aylward
George V. Aylward
Terence M. O'Brien
Ralph M. Russell
Attorneys for Robert Emmett O'Malley

Filed in the United States District Court June 7, 1941

[fol. 248] (Order Allowing Appeal to Defendant, Robert Emmett O'Malley.)

In the District Court of the United States of America for the Central Division of the Western District of Missouri United States of America, Plaintiff, vs. Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack, Defendants. No. 5,040. a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

Before KIMBROUGH STONE, Circuit Judge, ALBERT L. REEVES and MERRILL E. OTIS, District Judges.

Now on this 7th day of June, 1941, comes the defendant, Robert Emmett O'Malley, by his attorneys, and presents his petition for an appeal, which said petition; together with Assignment of Errors intended to be urged by him, has been previously filed in the office of the clerk of this court, and petition praying that an appeal be allowed, that a writ of appeal issue; that a transcript of record, proceedings, and exhibits, upon which the judgment in said District Court was rendered, duly authenticated, be sent to the United States Circuit Court of Appeals for the Eighth Circuit; that a supersedeas and stay of proceedings pending the determination of said appeal be granted; and an order be made, relating to the security to be required by said defendant.

Now, upon consideration of said petition, it is ordered that an appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the judgment heretofore entered in said District Court, be, and the same is hereby allowed to the defendant; that a writ of appeal [fol. 249] issue herein; that a certified transcript of testimony, exhibits, and all proceedings, be forthwith transmitted to the United States Circuit Court of Appeals, as aforesaid; and that, upon the said defendant giving bond, according to law, in the sum of $2500.00, said defendant shall be allowed to appeal, and said bond shall act as a

supersedeas and stay of execution, pending the determination of said appeal.

Kimbrough Stone
Circuit Judge

Albert L. Reeves
District Judge

Merrill E. Otis
District Judge

Filed in the United States District Court June 7, 1941

[fol. 250] (Bail Bond on Appeal of Defendant, Robert Emmett O'Malley.)

KNOW ALL MEN BY THESE PRESENTS, that we, Robert Emmett O'Malley, the above named defendant, as principal, and NATIONAL SURETY CORPORATION, as surety, do acknowledge ourselves to be indebted unto the United States of America, in the sum of Twenty five Hundred and oo/100 $2500.00 Dollars, upon the following condition:

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 7th day of June, 1941.

WHEREAS, on June 7, 1941, in the above entitled cause, the defendant, Robert Emmett O'Malley, was convicted and sentenced for contempt of this court; and

WHEREAS, said defendant has duly appealed from the judgment of conviction and sentence; and

WHEREAS, defendant has been duly admitted to bail pending an appeal from the said conviction and sentence and the amount of bail bond for the appearance of said defendant has been fixed by the said court in the sum of [fol. 251] Twenty Five Hundred $2500.00 Dollars,

Now, the condition of this obligation is such that if the said Robert Emmett O'Malley shall appear either in person or by his attorneys in the United States Circuit Court

of Appeals for the Eighth Circuit on such day or days as may be appointed for the hearing of said cause in said court and prosecute his said appeal; and shall surrender himself at the time and place and to the proper authorized officer as said Circuit Court of Appeals may direct in the event the judgment of conviction and sentence be affirmed or the appeal is dismissed, and shall appear for trial in this statutory United States District Court for the Central Division of the Western District of Missouri on such day or days as may be appointed for re-trial by said District Court, in the event the judgment of conviction and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Eighth Circuit; for a re-trial, then the obligation to be void; otherwise to remain in full force and effect.

Surety does not hereby obligate itself in any way to pay any fine or costs assessed against the defendant, Robert Emmett O'Malley, in the above entitled cause.

Robert Emmet O'Malley
Principal
National Surety Corporation
By G. B. Howland (Seal)
Attorney-in-fact
Surety

Approved as to form

Richard K. Phelps
Asst U. S. Atty

Approved:

.....
United States Circuit Judge

Albert L. Reeves
United States District Judge

.....
United States District Judge

Filed in the United States District Court June 7, 1941

[fol. 252] (Notice of Appeal of Defendant, A. L. McCormack.)

In the District Court of the United States of America for the Central Division of the Western District of Missouri. United States of America, Plaintiff, vs. Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack, Defendants. No. 5,040. a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

Before KIMBROUGH STONE, Circuit Judge, ALBERT L. REEVES and MERRILL E. OTIS, District Judges.

Name and address of appellant: A. L. McCormack St. Louis, Missouri.

Name and address of appellant's attorney: Forest W. Hanna Fidelity Building Kansas City, Missouri.

Offense: Contempt of Court

Date of Judgment: June 7, 1941.

Brief Description of judgment or sentence:

Name of prison where now confined, if not on bail: Defendant is now on bail.

I the above named appellant, hereby appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the judgment above mentioned on the grounds set forth below.

A. L. McCormack
Appellant

Dated June 7th, 1941.

Service acknowledged above date

Richard K. Phelps, Asst. U.S. Atty, and amicus curiae by Charles F. Lamkin, Jr., Asst. U.S. Atty.

[fol. 253] Grounds of Appeal:

1. Because the three-judge court erred in failing to hold that under the pleadings, the law and the evidence, this defendant was not shown to be guilty of the offense sought to be charged in this proceeding.

2: Because under the pleadings, the law and the evidence, this defendant is entitled to judgment and the three-judge court erred in failing to render judgment on behalf of this defendant.

3: Because the three-judge court erred in not finding the defendant not guilty of contempt of court under the pleadings, the law and the evidence.

4: Because the three-judge court erred in not finding under the pleadings, the law and the evidence, that this defendant was not shown to be guilty of contempt which this three-judge court had power or authority to punish.

5: Because the three-judge court was without jurisdiction to entertain, hear or determine this proceeding and erred in not so holding.

6: Because the three-judge court erred in assuming jurisdiction to entertain, hear or determine this proceeding in contempt, or to try or convict this defendant of the offense sought to be charged.

7: Because the three-judge court erred in assuming jurisdiction to punish this defendant for the alleged contempt sought to be charged.

8: Because the three-judge court was illegally convened at the inception of the insurance rate litigation mentioned in evidence (American Insurance Co. vs. Joseph B. Thompson, Superintendent of Missouri, et al., No. 270 in Equity, and companion cases bearing Docket Nos. 271 to 426, incl.) and did not lawfully acquire jurisdiction therein

[fol. 254] 9: Because the three-judge court was without jurisdiction to entertain, consider, approve or disapprove the purported settlement or stipulation of settlement of the insurance rate litigation mentioned in evidence, and erred in assuming, undertaking or entertaining such jurisdiction.

10: Because the three-judge court was without jurisdiction to disburse or supervise the disbursement of impounded funds mentioned in evidence.

11: Because the purported settlement of the insurance rate litigation mentioned in evidence was a nullity and not susceptible of approval or enforcement by the three-judge court, and the three-judge court erred in holding that said matter was within its jurisdiction.

12: Because, if the three-judge court acquired jurisdiction of the insurance rate litigation mentioned in evidence (which this defendant denies) under the colorable averments of the bills filed, such jurisdiction was lost prior to the proceedings in said litigation relating to the purported settlement thereof; and that said three-judge court thereafter had no power or authority under the law to act therein.

13: Because, prior to the proceeding in the insurance rate litigation relating to the purported settlement thereof, the three-judge court and the litigants in said insurance rate litigation recognized the constitutionality of the State statutes assailed in the bills in equity therein, and were proceeding solely upon the theory that the action of the Superintendent of Insurance of the State of Missouri under constitutional statutes was confiscatory; as a result, any jurisdiction it may have theretofore acquired was thereupon lost and the three-judge court erred in proceeding thereafter, and was acting contrary to the terms and provisions of the Statutes of the United States authorizing the calling of a three-judge court.

[fol. 255] 14: Because the three-judge court under the statutes in such cases made and provided, could have acquired no jurisdiction in the insurance rate litigation mentioned in evidence other than to grant or deny injunctive relief sought on the ground of the unconstitutionality of a State statute or State statutes; and that in proceeding to entertain, hear, consider, approve and enforce the purported settlement of said insurance rate litigation, in whole or in part, the three-judge court was acting extrajudicially and its action was a nullity and void; and the three-judge court erred in continuing to assert jurisdiction thereafter.

15. Because the bills in equity filed by the insurance companies in the insurance rate litigation mentioned in evidence failed to state a cause of action, were not petitions or bills to review the action of the Superintendent of Insurance complained of, did not justify or authorize injunctive relief by the three-judge court, and said three-judge court sought to be convened, acquired no lawful jurisdiction and said three-judge court erred in asserting jurisdiction or proceeding in said causes.

16: Because the three-judge court erred in charging this defendant with notice of the terms of the purported

settlement, or that said purported settlement would be reduced to a written agreement and presented to the three-judge court for its approval, or that said three-judge court would act thereon, when such settlement was a nullity and when said three-judge court was without jurisdiction or authority to act thereon.

17: Because the three-judge court erred in asserting jurisdiction to direct the disbursement of the impounded funds mentioned in evidence in accordance with the purported settlement of said insurance rate litigation, or in taking any action thereon.

[fol. 256] 18: Because the three-judge court at the time of the alleged contempt charged herein was not a lawfully constituted court or exercising any lawful or constitutional or statutory jurisdiction, and its proceedings were erroneous and extrajudicial.

19: Because at the time of the institution of this proceeding, the three-judge court was not a lawfully constituted court or exercising any lawful or constitutional jurisdiction, and the three-judge court erred in attempting to assert jurisdiction herein.

20: Because the three-judge court, convened as a court of limited statutory jurisdiction, was without authority or jurisdiction to entertain, hear or determine this proceeding.

21: Because this proceeding was and is an independent action at law and not a part of the original proceeding in equity over which the three-judge court was attempting to assert jurisdiction; and said three-judge court therefore was without jurisdiction herein.

22: Because this proceeding is a prosecution for alleged criminal contempt and the three-judge court is vested with no jurisdiction thereover.

23: Because this proceeding was neither instituted nor maintained for the benefit of any litigant in the insurance rate litigation mentioned in evidence, or to coerce or compel obedience to any order, ruling, decree, or other purported exercise of jurisdiction by the three-judge court in said litigation, but solely to punish for past acts allegedly contemptuous of said three-judge court, and said three-judge court, vested at most with jurisdiction (which defendant denies) for limited purposes in said

original proceeding in equity, was without jurisdiction, power or authority so to punish.

[fol. 257] 24: Because the Information filed herein fails to state a cause of action against this defendant.

25: Because the Information filed in this proceeding shows upon its face that it is barred by the statute of limitations and that the alleged contemptuous acts asserted therein occurred more than three years next before the institution of said proceeding.

26: Because the Information shows that the alleged contemptuous acts sought to be charged against this defendant could not and did not constitute (a) contempt of court, (b) contempt of said three-judge court, (c) contempt of said three-judge court which said three-judge court had power, jurisdiction or authority to punish, or (d) contempt of said three-judge court, which said three-judge court had power or jurisdiction or authority to punish by summary process or by any procedure other than indictment.

27: Because the Information shows upon its face that the three-judge court was without jurisdiction in this action.

28: Because the maintenance of this prosecution subjected this defendant to double jeopardy in violation of the Fifth Amendment to the Constitution of the United States, in that this defendant had heretofore been prosecuted for the alleged offense or offenses sought to be charged in this proceeding under the indictments mentioned in evidence (United States vs. Thomas J. Pendergast, R. E. O'Malley and A. L. McCormack, No. 14912 and 14932, in the District Court of the United States for the Western Division of the Western District of Missouri), which said indictments were duly consolidated for trial and a jury duly impaneled and sworn and the United States thereafter dismissed said indictments and this defendant was acquitted and discharged thereunder, thereby having been acquitted of the offense or offenses charged in this proceeding; and the three-judge court erred in failing so to hold.

[fol. 258] 29: Because this defendant has been prosecuted by the United States for the alleged offense or offenses sought to be charged in this proceeding under the indictments mentioned in evidence, which said indict-

ments were consolidated for trial and a jury duly impaneled and sworn, and the United States thereafter dismissed said indictments and this defendant was acquitted and discharged thereunder, thereby having been acquitted of the offense or offenses sought to be charged in the Information herein.

30: Because under the evidence it appears that this prosecution was barred by the statute of limitations and that said prosecution was not instituted or the information filed within three years next after the occurrence of the alleged contemptuous acts, and the three-judge court erred in failing to so find.

31: Because the evidence on the trial before the three-judge court failed to show (a) that defendant was guilty of the offense charged or sought to be charged; (b) that the defendant was guilty of contempt of court; (c) that the defendant was guilty of contempt of said three-judge court; (d) that defendant was guilty of contempt of said three-judge court, which said three-judge court had power or authority to punish; (e) that defendant was guilty of contempt of said three-judge court, which said three-judge court had power or authority to punish by summary process or by Information or by procedure other than indictment; and the said three-judge court erred in failing so to find.

32: Because the acts charged against defendant and shown by the evidence did not constitute (a) contempt, (b) contempt of the three-judge court, (c) contempt of the three-judge court, which said three-judge court had power or authority to punish, (d) contempt of said three-judge court, which said three-judge court had power or authority to punish in this proceeding or otherwise than by indictment.

[fol. 259] 33: Because the evidence failed to show that this defendant was guilty of any act in law contemptuous of the three-judge court; and said three-judge court erred in failing to find the defendant not guilty.

34: Because this defendant could not properly be charged with the act or acts of others in allegedly inducing action on the part of the three-judge court, or expressly or by implication perpetrating a fraud upon said three-judge court when there was no evidence that this defendant was a party thereto or knew or anticipated that any action would or was to be thus induced or any fraud

so perpetrated; and no conspiracy was charged in the Information or shown by the evidence; and the three-judge court erred in charging this defendant with any act or acts of others in said particulars.

35: Because the evidence failed to show this defendant guilty beyond a reasonable doubt; and the three-judge court erred in its finding of guilt.

36: Because the members of the three-judge court who purported to act in this cause were in fact disqualified in said proceeding, and in acting therein deprived this defendant of liberty and property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

37: Because there was no evidence that this defendant was a party to the actual settlement agreed upon in the insurance rate case or to any act or acts of others in connection with such settlement, or in the approval thereof; and the three-judge court erred in making each finding made in connection therewith.

38: Because there was no evidence in this cause that this defendant participated in any act or acts contemptuous of the three-judge court, or was chargeable with any intent or design so to do.

[fol. 260] 39: Because there was no evidence that this defendant was a party directly or indirectly to the compromise or settlement of the insurance rate litigation actually executed; and the three-judge court erred in its findings in connection therewith.

40: Because there was no evidence that this defendant was a party directly or indirectly to any presentation of the stipulation of settlement mentioned in evidence, to the three-judge court for its approval (if there was evidence that such settlement was presented for approval, which defendant denies), or to the motion for decree mentioned in evidence, or to any action taken to obtain the approval of said three-judge court to said stipulation, or to induce any action on the part of said three-judge court with reference thereto; if there is evidence of any such action, which defendant denies; and the three-judge court erred in its finding in connection therewith.

41: Because there was no evidence that there was any agreement between the defendants herein and Charles R. Street or between this defendant or any of the other

defendants to the effect that they or any of them would keep the alleged transactions between them unknown to, or concealed from the said three-judge court, or that by affirmative acts of concealment or silence they or any of them would prevent said three-judge court from obtaining knowledge or information with reference thereto; and the evidence of the government in the trial of said cause was affirmatively to the contrary; and that by reason thereof the Government cannot rely upon any inference or presumption with reference to any such alleged agreement; and the Government is entitled to no such inference or presumption for the further reason that the evidence was undisputed that this defendant was not a party to any such agreement of any kind or character; and by reason of the facts aforesaid, the three-judge court erred in making its findings that there was such agreement. [fol. 261] its finding of guilt and in making each and all of its findings in connection with such alleged agreements.

42: Because there was no evidence that any concealment by this defendant before the United States Grand Jury of any facts relating to the settlement of the insurance rate litigation mentioned in evidence, if there was evidence of any such concealment, which defendant denies, was in furtherance of, or pursuant to any agreement whatsoever, and particularly to any agreement to which the defendant O'Malley was ever a party; and the evidence of the Government affirmatively disproved any such contention; and that by reason thereof, the three judge court erred in failing to find the defendant not guilty, and in failing to find that this action was barred by the statute of limitations; and further erred in making each and every finding which was made by said three-judge court in connection with said alleged Grand Jury testimony.

43: Because there was no evidence sufficient to establish the necessary elements and ingredients of the offense sought to be charged; and the three-judge court erred in making its finding of guilt.

44: Because there was no evidence sufficient to establish any offense on the part of this defendant committed within the jurisdiction of the three-judge court; and the three-judge court erred in making its finding of guilt for said reason.

45: Because there was no evidence sufficient to establish contemptuous intent upon the part of this defendant; and the three-judge court erred in its finding of guilt.

46: Because there was no evidence suficient to establish that this defendant was guilty of misbehavior in the presence of the three-judge court, or so near thereto as to obstruct the administration of justice; and the three-judge court erred in finding this defendant guilty.

[fol. 262] 47: Because the three-judge court erred in overruling and denying and failing to sustain the motion of this defendant to abate and quash the Information filed in said three-judge court, and to withdraw the rule to show cause for each and all of the reasons therein appearing.

48: Because the three-judge court erred in overruling and denying, and in failing to sustain the motion of this defendant at the close of the evidence of the United States to declare this defendant not guilty and to dismiss this proceeding, for each and all of the reasons therein appearing, and for each and all of the grounds therein stated.

49: Because the three-judge court erred in overruling and denying, and failing and refusing to sustain the motion of this defendant at the close of all the evidence to declare this defendant not guilty, and to dismiss this proceeding, for each and all of the reasons contained in said motion.

50: Because the three-judge court erred in admitting and receiving, over the objection and exception of this defendant, incompetent, irrelevant and immaterial evidence.

51: Because the three-judge court erred in excluding over the exceptions of this defendant, competent, material and relevant evidence duly offered by this defendant.

52: Because the three-judge court erred in overruling and failing and refusing to sustain motions to strike incompetent, irrelevant and immaterial evidence, which said motions were duly made by this defendant.

53: Because the three-judge court erred in overruling, and in failing and refusing to sustain motions duly made by this defendant to limit and restrict the effect of purported evidence.

54: Because the findings, opinions and judgment of the three-judge court are against the law and the evidence.

[fol. 263] 55: Because the findings, opinions and judgment of the three-judge court, and each part thereof, are unsupported by substantial evidence.

56: Because the findings, opinions and judgment of the three-judge court are against the greater weight of the evidence.

57: Because the three-judge court erred in making and entering its first finding of fact (which said finding is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside the record of this cause, which said finding was made over the objection and exception of this defendant.

58: Because the three-judge court erred in making and entering its second finding of fact (which said finding of fact is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by any evidence and is predicated upon alleged matters and facts outside the record in this cause; and for the further reason that it contains broad and sweeping conclusions of law not predicated upon any evidence in the cause, which said finding was made over the objection and exception of this defendant.

59. Because the three-judge court erred in making and entering, over the objection and exception of this defendant, its third finding of fact (which said finding is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence and is predicated upon alleged matters and facts outside of the record in this cause; and for the further reason that it contains broad and sweeping conclusions of law not predicated upon any evidence in the cause.

[fol. 264] 60: Because the three-judge court erred in making and entering its third finding of fact for the reason that said finding of fact purports to find that this defendant and the other defendants entered into a conspiracy to present to the three-judge court in open court a purportedly fake settlement and to grossly deceive said

three-judge court by the alleged lying, false and fraudulent representations allegedly made in open court at the instance of defendant, which said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, or any evidence, and is predicated upon alleged matters and facts outside the record in this cause, and contains broad and general conclusions of law not predicated upon any evidence in this cause, and was made over the objection and exception of this defendant.

61: Because the three-judge court erred in making and entering, over the objection and exception of this defendant, its fourth findings of fact (which said finding is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside the record in this cause; and for the further reason that said finding contains broad and general conclusions of law not predicated upon any evidence in this cause.

62: Because the three-judge court erred in making, over the objection and exception of this defendant, each and every finding of fact made by said Court, whether made in said formal finding of fact or elsehwere in said opinions, or made in its judgment of conviction for the reason that each of said findings is contrary to the evidence, is contrary to the greater weight of the evidence, is unsupported by substantial evidence, is predicated upon alleged matters and facts outside the record in the cause; and for the reason that each of said findings con-[fol. 265] tains erroneous conclusions of law, not predicated upon any evidence in the cause.

63: Because the three-judge court erred in each and all of its conclusions of law.

64: Because the three-judge court erred in holding that any acts of this defendant shown by the evidence constituted contempt of said court, punishable by said court in this proceeding.

65: Because the three-judge court erred in its opinion in this cause in purporting to find in the first footnote to said opinion that this action was a proceeding incidental to American Insurance Co., et al, vs. Thompson, In Equity No. 270, when in fact this proceeding in contempt

entitled United States of America, vs. Thomas J. Pendergast, et al., was a separate, independent criminal proceeding between the United States of America, plaintiff, and Thomas J. Pendergast, Robert Emmett [O'Mally] and A. L. McCormack, defendants, and was numbered 5040, said number being a number assigned to this cause on the criminal docket of the Central Division of the District Court of the United States for the Western District of Missouri, presided over by the Honorable John C. Collet, District Judge.

66: Because the three-judge court erred in its opinion in holding that bribery was committed by this defendant or any of these defendants, or that political influence was brought to bear by the delivery by this defendant of $440,000 for the reason that said purported finding and said statement is unsupported by any evidence in the record in this cause, and is contrary to the evidence.

67: Because the three-judge court erred in finding in its opinions that this defendant committed acts in open court in the presence and face of the Court grossly to deceive and hoodwink the Judges constituting the Court, said findings being unsupported by any evidence in the [fol. 266] record in this cause, and contrary to the evidence; and if said finding was published in said opinions as a conclusion of law, said conclusion is erroneous and not predicated upon any evidence in the record.

58: Because the three-judge court erred in holding, finding and concluding in its opinions that this defendant or these defendants "prostituted the Court to their venal purposes and exposed its Judges to the possibility of disgrace and to certain humiliation," said finding, holding and conclusion being unsupported by any evidence in the record of this cause and contrary to any evidence in the record of this cause.

59: Because the three-judge court erred in finding, holding and concluding that they were guilty of the alleged misbehaviour, and in purporting to predicate a finding of guilt upon said alleged absence of a denial for the reason that said finding is not supported by the evidence, is contrary to the evidence and the pleadings in this cause, and ignores the issues.

60: Because the three-judge court erred in finding, holding and concluding in its opinion that this defendant

and other defendants "stood on their technicalities", and erred in finding these defendants guilty of contempt of said three-judge court on said ground, said finding, holding and conclusion being in violation of this defendant's constitutional right guaranteed to him by Article V of the Amendments to the Constitution of the United States, which, in part, provides as follows:

> "No person shall be * * * compelled in any criminal case to be a witness against himself * * *",

in that the finding of guilt in said cause is based and predicated upon the failure of this defendant to testify in said cause.

61: Because the three-judge court erred in making a [fol. 267] purported finding in a footnote to its opinion as follows:

> "The whole history of the criminal cases which resulted in the imposition of sentences on Pendergast and O'Malley for attempted evasion of income taxes, including much which throws light upon the background of the present proceeding in contempt, is set out in United States vs. Pendergast and O'Malley, 28 Fed. Supp. 601,"

for the reason that said purported finding is not based upon any evidence in this cause, is outside the record, and attempts to incorporate into this proceeding matters not in issue.

62: Because the three-judge court erred in erroneously construing the case of Nye and Mayers vs. United States of America, decided by the Supreme Court of the United States on April 10, 1941 and Reported in ..... U.S. ....., 61 Sup.Ct.Rep. 810; 85 L. Ed. 733, 744 and in drawing unreasonable and unwarranted inferences therefrom, and in holding that said decision was not applicable to this proceeding.

63: Because the three-judge court erred in finding, holding and concluding that this defendant and the other defendants "sent their messengers (their innocent and unsuspecting messengers) to the very courtroom and into open court", said finding being unsupported by any evidence in the record in this cause and contrary to the evidence in the record in this cause.

64: Because the three-judge court erred in finding, holding and concluding in its opinion that the alleged "misbehavior of these defendants was committed, where it took effect and where it was intended to take effect"; said finding, holding and conclusion being unsupported by any evidence in the record in this proceeding, and contrary to any evidence in the record in this proceeding.

65: Because the three-judge court erred in its deduction that the facts allegedly proved that there was a conspiracy between Street, O'Malley, McCormack and Pendergast to obtain decrees disposing of the impounded fund, for the reason that said purported finding, conclu- [fol. 268] sion and deduction is contrary to the pleadings, unsupported by the evidence, and contrary to the evidence.

66: Because the three-judge court erred in its opinion in this cause in holding that the prosecution herein was not barred by the statute of limitations, for each and all of the following reasons: (1) because it appears from the fact of the Information herein that said prosecution against this defendant is barred by the statute of limitations; (2) because under the evidence in the cause it appears that said prosecution is barred by the statute of limitations; (3) because each and all of the three-judge court's findings with reference to the statute of limitations are unsupported by the evidence and contrary to the undisputed evidence; (4) because it affirmatively appears from the evidence that the theory upon which the three-judge court held that the statute of limitations did not apply was erroneous in law and unsupported by the evidence.

67: Because the three-judge court erred in holding, finding and concluding that the alleged deception of this defendant and the other defendants continued the alleged misbehavior far beyond the actual entry of the decree in the insurance rate litigation, for the reason that said finding is unsupported by the evidence and is contrary to the undisputed evidence, and is erroneous in law.

68: Because the three-judge court erred in finding in its opinion that this defendant and the other defendants committed particular acts of "supplemental deception", said finding being unsupported by any evidence in the record in this cause and contrary to the evidence.

69: Because the three-judge court erred in its purported findings in its opinion to the effect that this defendant committed perjury before the Grand Jury, and

[fol. 269] that said alleged perjury was committed as a result of an agreement between the defendants and was an affirmative act of deception, for the reason that said purported finding is unsupported by the evidence, is an erroneous conclusion, which is contrary to the evidence.

70: Because the three-judge court erred in finding and concluding that it could be reasonably inferred that this defendant and the other defendants had entered into an agreement with reference to this defendant's testimony before said Grand Jury, for the reason that said purported inference is unwarranted by the evidence, is contrary to the evidence, and was affirmatively destroyed by the undisputed and uncontradicted evidence offered on behalf of the Government.

71: Because the three-judge court erred in its opinion in holding, concluding and finding that the alleged acts of the defendant were calculated to stir the Court's resentment and anger, and that the stirring of the Court's resentment and anger was the actual offense allegedly committed by this defendant and the other defendants, for the reason that said finding is erroneous in law, unsupported by the evidence, and contrary to the evidence.

72: Because the three-judge court erred in finding, holding and concluding that "There is no statute of limitations applicable to contempt committed 'In the presence of the Court' ", for the reason that said statement is an erroneous conclusion of law, and for the further reason that it affirmatively appears from the evidence in this cause that there was no contempt committed in the presence of the Court.

73: Because the three-judge court erred in finding, holding and concluding in its opinion that the statute of limitations did not begin to run in this case until the alleged deception practiced by the defendants ceased to have effect, nor until the last alleged affirmative act fortifying the alleged deception was committed by the al-[fol. 270] leged conspirators or any of them, nor until the essence of the alleged contempt became an active principle by the alleged discovery of the truth, said conclusion being erroneous in law and unsupported by any evidence in the record, and being contrary to the evidence in the record.

74: Because the three-judge court erred in its opinion by finding that the United States District Attorney made

an agreement with this defendant not to prosecute this defendant under the indictments for obstructing justice and defrauding the United States Government mentioned in the evidence, and for this information in contempt of court, for the reason that there is no evidence of such an agreement between the said District Attorney and this defendant.

75: Because the three-judge court erred in its opinion by finding and holding on the issue of double jeopardy, that this defendant sought the dismissal of said indictments for conspiracy to obstruct justice and conspiracy to defraud the United States Government mentioned in the evidence, because of an agreement between the United States District Attorney and this defendant, so to do, for the reason that said finding is unsupported by any evidence and is contrary to the evidence.

76: Because the three-judge court erred in finding, holding and concluding that this defendant and the other defendants "did everything conceivably possible to be done to avoid trial" under indictments returned in causes entitled United States of America, plaintiff vs. Thomas J. Pendergast, R. E. O'Malley and A. L. McCormack, defendants, No. 14912 and 14932, in the District Court of the United States for the reason that said finding is unsupported by any evidence in the record, and contrary to the evidence.

77: Because the three-judge court erred in making [fol. 271] purported findings of fact in its opinion, which said purported findings of fact were erroneous, misleading, and confusing and inconsistent with, and not supported by any evidence in the record in this cause, and containing conclusions of law not supported by the evidence in the record in this cause, and containing conclusions of law not supported by the evidence, and not predicated upon the evidence, said findings of fact serving no lawful or proper procedural function in a prosecution for criminal contempt.

78: The three-judge court erred in overruling defendant's motion for new trial and each separate assignment therein.

WHEREFORE, by reason whereof and on account of the grounds of appeal above assigned and cited, and of which complaint is herein made, defendant, A. L. McCormack,

prays that the judgment and sentence of the court entered against defendant herein be reversed, set aside and for naught held.

Forest W. Hanna
Attorney for A. L. McCormack

Filed in the United States District Court June 7, 1941

[fol. 272] (Notice of Notice of Appeal of Defendant, A. L. McCormack, and Acknowledgment of Service.)

In the District Court of the United States of America for the Central Division of the Western District of Missouri United States of America, Plaintiff, vs. Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack, Defendants. No. 5,040. a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

To -- the United States of America, the above named plaintiff, or Maurice M. Milligan, United States District Attorney for the Western District of Missouri:

You, and each of you, are hereby notified that A. L. McCormack, the above named defendant, has appealed to the United States Circuit Court of Appeals for the Eighth Circuit, from the judgment of conviction rendered in this cause; and from the sentence and punishment imposed by the aforesaid court pursuant thereto; as well as from all such other actions, rulings and orders of the aforesaid court, in this cause; and of which complaint is specifically made in separate motions for a new trial and assignment of errors, in this cause; and you and each of you are hereby notified that said appeal is made and rendered returnable within ___ days hereafter in the United States Circuit Court of Appeals for the Eighth Circuit. in the City of Saint Louis, Missouri.

[fol. 273] Forest W. Hanna
Attorney for A. L. McCormack

I hereby, this June 7, 1941, acknowledge service of the above and foregoing notice of appeal; and further acknowledge receipt of copy thereof, as well as a copy of the motion for a new trial, to which reference is made therein.

Richard K. Phelps
For the United States District Attorney for the Western District of Missouri.

Filed in the United States District Court June 7, 1941

(Duplicate Notice of Appeal of Defendant, A. L. McCormack Filed in Appellate Court.)

The Duplicate Notice of Appeal of the Defendant, A. L. McCormack, was filed in the United States Circuit Court of Appeals on July 10, 1941, but same is omitted from the printed record at this place to avoid duplication inasmuch as the Notice of Appeal on behalf of the Defendant A. L. McCormack which was filed in the District Court heretofore appears in this printed record at folio page 252.

[fol. 274] (Citation on Appeal of Defendant, A. L. McCormack, and Acknowledgment of Service.)

In the District Court of the United States of America for the Central Division of the Western District of Missouri. United States of America, Plaintiff, vs. Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack, Defendants. No. 5,040. a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

Before KIMBROUGH STONE, Circuit Judge, ALBERT L. REEVES and MERRILL E. OTIS, District Judges.

UNITED STATES OF AMERICA ---- SS.

To: The United States of America and MAURICE M. MILLIGAN, United States Attorney for the Western District of Missouri,

GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the

Eighth Circuit, to be held at the City of Saint Louis, Missouri, on the 7th day of July, 1941, pursuant to an order allowing an appeal and notice of appeal filed and entered in the District Court of the United States of America for the Central Division of the Western District of Missouri, from a judgment signed, sealed and entered on the 7th day of June, A.D. 1941, in that certain cause, being criminal cause No. 5,040, and entitled United States of America (appellee) vs. Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack, Defendants (and Appellants), to show cause, if any there be, why the judgment rendered against the said appellants, as in said order allowing appeal and as in said notice of appeal mentioned, should not be corrected and why justice should [fol. 275] not be done in that behalf.

WITNESS The Honorable Kimbrough Stone, Judge, United States Circuit Court of Appeals, Eighth Circuit; The Honorable Albert L. Reeves, Judge, United States District Court, Western District of Missouri, Eighth Circuit; The Honorable Merrill E. Otis, Judge, United States District Court, Western District of Missouri, Eighth Circuit, this 7th day of June, A. D. 1941, and of the Independence of the United States 165.

Kimbrough Stone
United States Circuit Judge

Albert L. Reeves.
United States District Judge

Merrill E. Otis
United States District Judge

Service acknowledged above date

Richard K. Phelps, Asst. U. S. Atty. and amicus curiae by Charles F. Lamkin, Jr., Asst. U.S. Atty.

Filed in the United States District Court June 7, 1941

[fol. 276] (Petition for Appeal of Defendant, A. L. McCormack.)

To: The Honorable Kimbrough Stone, Circuit Judge,
The Honorable Albert L. Reeves, District Judge,
The Honorable Merrill E. Otis, District Judge.

Comes now defendant, A. L. McCormack, and respectfully shows that on June 7, 1941, a judgment of conviction of contempt of this court was rendered against him, and sentence was rendered against him herein.

That your petitioner feels himself aggrieved by said judgment and sentence entered thereon, as aforesaid, and petitions the court for an order allowing him to prosecute an appeal, and allowing him an appeal, to the United States Circuit Court of Appeals, for the Eighth District, under the laws of the United States of America in such cases made and provided.

WHEREFORE, the premises considered, your petitioner prays that an appeal be ordered and allowed from said judgment, and every part thereof, to the United States Circuit Court of Appeals for the Eighth Circuit; for the reasons set forth in the Assignment of Errors herein, and that said appeal be allowed your petitioner to the United States Circuit Court of Appeals, as aforesaid, for the correction of errors complained of; that citation be issued [fol. 277] as provided by law; that a transcript of the record, proceedings and exhibits, upon which said judgment was based, duly authenticated, be sent to the said Circuit Court of Appeals, under the rules of said court, in such cases made and provided; and that your petitioner be granted a supersedeas and stay of execution of proceedings and sentence, pending the determination of said appeal, and that proper order relating to securities to be required of your petitioner be made.

Forest W. Hanna
Attorney for A. L. McCormack.

Filed in the United States District Court June 7, 1941

[fol. 278] (Assignment of Errors of Defendant, A. L. McCormack.)

In the District Court of the United States of America for the Central Division of the Western District of Missouri. United States of America, Plaintiff, vs. Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack, Defendants. No. 5,040. a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

Before KIMBROUGH STONE, Circuit Judge, ALBERT L. REEVES and MERRILL E. OTIS, District Judges.

Comes now the above named defendant, A. L. McCormack, and in connection with his appeal herein, which has heretofore been taken in this cause on the 7th day of June, 1941, and makes the following assignment of errors, which he avers accrued and occurred upon the proceedings and the trial of this cause and upon which he relies to set aside and reverse the judgment and sentence heretofore rendered and entered herein, as appears of record herein:

[fol. 279] Grounds of Appeal:

1: Because the three-judge court erred in failing to hold that under the pleadings, the law and the evidence, this defendant was not shown to be guilty of the offense sought to be charged in this proceeding.

2: Because under the pleadings, the law and the evidence, this defendant is entitled to judgment and the three-judge court erred in failing to render judgment on behalf of this defendant.

3: Because the three-judge court erred in not finding the defendant not guilty of contempt of court under the pleadings, the law and the evidence.

4: Because the three-judge court erred in not finding under the pleadings, the law and the evidence, that this defendant was not shown to be guilty of contempt which this three-judge court had power or authority to punish.

5: Because the three-judge court was without jurisdiction to entertain, hear or determine this proceeding and erred in not so holding.

6: Because the three-judge court erred in assuming jurisdiction to entertain, hear or determine this proceed-

ing in contempt, or to try or convict this defendant of the offense sought to be charged.

7: Because the three-judge court erred in assuming jurisdiction to punish this defendant for the alleged contempt sought to be charged.

8: Because the three-judge court was illegally convened at the inception of the insurance rate litigation mentioned in evidence (American Insurance Co. vs. Joseph B. Thompson, Superintendent of Missouri, et al., No. 270 in Equity, and companion cases bearing Docket Nos. 271 to 426, incl.), and did not lawfully acquire jurisdiction therein.

[fol. 280] 9. Because the three-judge court was without jurisdiction to entertain, consider, approve or disapprove the purported settlement or stipulation of settlement of the insurance rate litigation mentioned in evidence, and erred in assuming, undertaking or entertaining such jurisdiction.

10: Because the three-judge court was without jurisdiction to disburse or supervise the disbursement of impounded funds mentioned in evidence.

11: Because the purported settlement of the insurance rate litigation mentioned in evidence was a nullity and not susceptible of approval or enforcement by the three-judge court, and the three-judge court erred in holding that said matter was within its jurisdiction.

12: Because, if the three-judge court acquired jurisdiction of the insurance rate litigation mentioned in evidence (which this defendant denies) under the colorable averments of the bills filed, such jurisdiction was lost prior to the proceedings in said litigation relating to the purported settlement thereof; and that said three-judge court thereafter had no power or authority under the law to act therein.

13: Because, prior to the proceeding in the insurance rate litigation relating to the purported settlement thereof, the three-judge court and the litigants in said insurance rate litigation recognized the constitutionality of the State statutes assailed in the bills in equity therein, and were proceeding solely upon the theory that the action of the Superintendent of Insurance of the State of Missouri under constitutional statutes was confiscatory; as a result, any jurisdiction it may have theretofore acquired

was thereupon lost and the three-judge court erred in proceeding thereafter, and was acting contrary to the terms and provisions of the Statutes of the United States authorizing the calling of a three-judge court.

[fol. 281] 14: Because the three-judge court under the statutes in such cases made and provided, could have acquired no jurisdiction in the insurance rate litigation mentioned in evidence other than to grant or deny injunctive relief sought on the ground of the unconstitutionality of a State statute or State statutes; and that in proceeding to entertain, hear, consider, approve and enforce the purported settlement of said insurance rate litigation, in whole or in part, the three-judge court was acting extrajudicially and its action was a nullity and void; and the three-judge court erred in continuing to assert jurisdiction thereafter.

15. Because the bills in equity filed by the insurance companies in the insurance rate litigation mentioned in evidence failed to state a cause of action, were not petitions or bills to review the action of the [Supreintendent] of Insurance complained of, did not justify or authorize injunctive relief by the three-judge court, and said three-judge court sought to be convened, acquired no lawful jurisdiction and said three-judge court erred in asserting jurisdiction or proceeding in said causes.

16: Because the three-judge court erred in charging this defendant with notice of the terms of the purported settlement, or that said purported settlement would be reduced to a written agreement and presented to the three-judge court for its approval, or that said three-judge court would act thereon, when such settlement was a nullity and when said three-judge court was without jurisdiction or authority to act thereon.

17: Because the three-judge court erred in asserting jurisdiction to direct the disbursement of the impounded funds mentioned in evidence in accordance with the purported settlement of said insurance rate litigation, or in taking any action thereon.

[fol. 282] 18: Because the three-judge court at the time of the alleged contempt charged herein was not a lawfully constituted court or exercising any lawful or constitutional or statutory jurisdiction, and its proceedings were erroneous and extrajudicial.

19: Because at the time of the institution of this proceeding, the three-judge court was not a lawfully constituted court or exercising any lawful or constitutional jurisdiction, and the three-judge court erred in attempting to assert jurisdiction herein.

20: Because the three-judge court, convened as a court of limited statutory jurisdiction, was without authority or jurisdiction to entertain, hear or determine this proceeding.

21: Because this proceeding was and is an independent action at law and not a part of the original proceeding in equity over which the three-judge court was attempting to assert jurisdiction; and said three-judge court therefore was without jurisdiction herein.

22: Because this proceeding is a prosecution for alleged criminal contempt and the three-judge court is vested with no jurisdiction thereover.

23: Because this proceeding was neither instituted nor maintained for the benefit of any litigant in the insurance rate litigation mentioned in evidence, or to coerce or compel obedience to any order, ruling, decree, or other purported exercise of jurisdiction by the three-judge court in said litigation, but solely to punish for past acts allegedly contemptuous of said three-judge court, and said three-judge court, vested at most with jurisdiction (which defendant denies) for limited purposes in said original proceeding in equity, was without jurisdiction, power or authority so to punish.

[fol. 283] 24: Because the Information filed herein fails to state a cause of action against this defendant.

25: Because the Information filed in this proceeding shows upon its face that it is barred by the statute of limitations and that the alleged comtemptuous acts asserted therein occurred more than three years next before the institution of said proceeding.

26: Because the Information shows that the alleged contemptuous acts sought to be charged against this defendant could not and did not constitute (a) contempt of court, (b) contempt of said three-judge court, (c) contempt of said three-judge court which said three-judge court had power, jurisdiction or authority to punish, or (d) contempt of said three-judge court, which said three-judge court had power or jurisdiction or authority to pun-

ish by summary process or by any procedure other than indictment.

27: Because the Information shows upon its face that the three-judge court was without jurisdiction in this action.

28: Because the maintenance of this prosecution subjected this defendant to double jeopardy in violation of the Fifth Amendment to the Constitution of the United States, in that this defendant had heretofore been prosecuted for the alleged offense or offenses sought to be charged in this proceeding under the indictments mentioned in evidence (United States vs. Thomas J. Pendergast, R. E. O'Malley and A. L. McCormack, No. 14912 and 14932, in the District Court of the United States for the Western Division of the Western District of Missouri), which said indictments were duly consolidated for trial and a jury duly impaneled and sworn and the United States thereafter dismissed said indictments and this defendant was acquitted and discharged thereunder, thereby having been acquitted of the offense or offenses charged in this proceeding; and the three-judge court erred in failing so to hold.

[fol. 284] 29: Because this defendant has been prosecuted by the United States for the alleged offense or offenses sought to be charged in this proceeding under the indictments mentioned in evidence, which said indictments were consolidated for trial and a jury duly impaneled and sworn, and the United States thereafter dismissed said indictments and this defendant was acquitted and discharged thereunder, thereby having been acquitted of the offense or offenses sought to be charged in the Information herein.

30: Because under the evidence it appears that this prosecution was barred by the statute of limitations and that said prosecution was not instituted or the information filed within three years next after the occurrence of the alleged contemptuous acts, and the three-judge court erred in failing to so find.

31: Because the evidence on the trial before the three-judge court failed to show (a) that defendant was guilty of the offense charged or sought to be charged; (b) that the defendant was guilty of contempt of court; (c) that the defendant was guilty of contempt of said three-judge

court; (d) that defendant was guilty of contempt of said three-judge court, which said three-judge court had power or authority to punish; (e) that defendant was guilty of contempt of said three-judge court, which said three-judge court had power or authority to punish by summary process or by Information or by procedure other than indictment; and the said three-judge court erred in failing so to find.

32: Because the acts charged against defendant and shown by the evidence did not constitute (a) contempt, (b) contempt of the three-judge court, (c) contempt of the three-judge court, which said three-judge court had power or authority to punish, (d) contempt of said three-judge court, which said three-judge court had power or authority to punish in this proceeding or otherwise than by indictment.

[fol. 285] 33: Because the evidence failed to show that this defendant was guilty of any act in law contemptuous of the three-judge court; and said three-judge court erred in failing to find the defendant not guilty.

34: Because this defendant could not properly be charged with the act or acts of others in allegedly inducing action on the part of the three-judge court, or expressly or by implication perpetrating a fraud upon said three-judge court when there was no evidence that this defendant was a party thereto or knew or anticipated that any action would or was to be thus induced or any fraud so perpetrated; and no conspiracy was charged in the Information or shown by the evidence; and the three-judge court erred in charging this defendant with any act or acts of others in said particulars.

35: Because the evidence failed to show this defendant guilty beyond a reasonable doubt; and the three-judge court erred in its finding of guilt.

36: Because the members of the three-judge court who purported to act in this cause were in fact disqualified in said proceeding, and in acting therein deprived this defendant of liberty and property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

37: Because there was no evidence that this defendant was a party to the actual settlement agreed upon in the insurance rate case or to any act or acts of others in con-

nection with such settlement, or in the approval thereof; and the three-judge court erred in making each finding made in connection therewith.

38: Because there was no evidence in this cause that this defendant participated in any act or acts contemptuous of the three-judge court, or was chargeable with any intent or design so to do.

[fol. 286] 39. Because there was no evidence that this defendant was a party directly or indirectly to the compromise or settlement of the insurance rate litigation actually executed; and the three-judge court erred in its findings in connection therewith.

40: Because there was no evidence that this defendant was a party directly or indirectly to any presentation of the stipulation of settlement mentioned in evidence, to the three-judge court for its approval (if there was evidence that such settlement was presented for approval, which defendant denies), or to the motion for decree mentioned in evidence, or to any action taken to obtain the approval of said three-judge court to said stipulation, or to induce any action on the part of said three-judge court with reference thereto; if there is evidence of any such action, which defendant denies; and the three-judge court erred in its finding in connection therewith.

41: Because there was no evidence that there was any agreement between the defendants herein and Charles R. Street or between this defendant or any of the other defendants to the effect that they or any of them would keep the alleged transactions between them unknown to, or concealed from the said three-judge court, or that by affirmative acts of concealment or silence they or any of them would prevent said three-judge court from obtaining knowledge or information with reference thereto; and the evidence of the government in the trial of said cause was affirmatively to the contrary; and that by reason thereof the Government cannot rely upon any inference or presumption with reference to any such alleged agreement; and the Government is entitled to no such inference or presumption for the further reason that the evidence was undisputed that this defendant was not a party to any such agreement of any kind or character; and by reason of the facts aforesaid, the three-judge court erred in making its findings that there was such agreement, [fol. 287] its finding of guilt and in making each and

all of its findings in connection with such alleged agreements.

42: Because there was no evidence that any concealment by this defendant before the United States Grand Jury of any facts relating to the settlement of the insurance rate litigation mentioned in evidence, if there was evidence of any such concealment, which defendant denies, was in furtherance of, or pursuant to any agreement whatsoever, and particularly to any agreement to which the defendant O'Malley was ever a party; and the evidence of the Government affirmatively disproved any such contention; and that by reason thereof, the three judge court erred in failing to find the defendant not guilty, and in failing to find that this action was barred by the statute of limitations; and further erred in making each and every finding which was made by said three-judge court in connection with said alleged Grand Jury testimony.

43: Because there was no evidence sufficient to establish the necessary elements and ingredients of the offense sought to be charged; and the three-judge court erred in making its finding of guilt.

44: Because there was no evidence sufficient to establish any offense on the part of this defendant committed within the jurisdiction of the three-judge court; and the three-judge court erred in making its finding of guilt for said reason.

45: Because there was no evidence sufficient to establish contemptuous intent upon the part of this defendant; and the three-judge court erred in its finding of guilt.

46: Because there was no evidence sufficient to establish that this defendant was guilty of misbehavior in the presence of the three-judge court, or so near thereto as to obstruct the administration of justice; and the three-judge court erred in finding this defendant guilty.

[fol. 288] 47: Because the three-judge court erred in overruling and denying and failing to sustain the motion of this defendant to abate and quash the Information filed in said three-judge court, and to withdraw the rule to show cause for each and all of the reasons therein appearing.

48: Because the three-judge court erred in overruling and denying, and in failing to sustain the motion of this defendant at the close of the evidence of the United States to declare this defendant not guilty and to dismiss this proceeding, for each and all of the reasons therein appearing, and for each and all of the grounds therein stated.

49: Because the three-judge court erred in overruling and denying, and failing and refusing to sustain the motion of this defendant at the close of all the evidence to declare this defendant not guilty, and to dismiss this proceeding, for each and all of the reasons contained in said motion.

50: Because the three-judge court erred in admitting and receiving, over the objection and exception of this defendant, incompetent, irrelevant and immaterial evidence.

51: Because the three-judge court erred in excluding over the exceptions of this defendant, competent, material and relevant evidence duly offered by this defendant.

52: Because the three-judge court erred in overruling and failing and refusing to sustain motions to strike incompetent, irrelevant and immaterial evidence, which said motions were duly made by this defendant.

53: Because the three-judge court erred in overruling, and in failing and refusing to sustain motions duly made by this defendant to limit and restrict the effect of purported evidence.

54: Because the findings, opinions and judgment of the three-judge court are against the law and the evidence.

[fol. 289] 55: Because the findings, opinions and judgment of the three-judge court, and each part thereof, are unsupported by substantial evidence.

56: Because the findings, opinions and judgment of the three-judge court are against the greater weight of the evidence.

57: Because the three-judge court erred in making and entering its first finding of fact (which said finding is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside the

record of this cause, which said finding was made over the objection and exception of this defendant.

58: Because the three-judge court erred in making and entering its second finding of fact (which said finding of fact is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by any evidence and is predicated upon alleged matters and facts outside the record in this cause; and for the further reason that it contains broad and sweeping conclusions of law not predicated upon any evidence in the cause, which said finding was made over the objection and exception of this defendant.

59. Because the three-judge court erred in making and entering, over the objection and exception of this defendant, its third finding of fact (which said finding is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence and is predicated upon alleged matters and facts outside of the record in this cause; and for the further reason that it contains broad and sweeping conclusions of law not predicated upon any evidence in the cause.

[fol. 290] 60: Because the three-judge court erred in making and entering its third finding of fact for the reason that said finding of fact purports to find that this defendant and the other defendants entered into a conspiracy to present to the three-judge court in open court a purportedly fake settlement and to grossly deceive said three-judge court by the alleged lying, false and fraudulent representations allegedly made in open court at the instance of defendant, which said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, or any evidence, and is predicated upon alleged matters and facts outside the record in this cause, and contains broad and general conclusions of law not predicated upon any evidence in this cause, and was made over the objection and exception of this defendant.

61: Because the three-judge court erred in making and entering, over the objection and exception of this defendant, its fourth findings of fact (which said finding is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of

the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside the record in this cause; and for the further reason that said finding contains broad and general conclusions of law not predicated upon any evidence in this cause.

62: Because the three-judge court erred in making, over the objection and exception of this defendant, each and every finding of fact made by said Court, whether made in said formal finding of fact or elsewhere in said opinions, or made in its judgment of conviction for the reason that each of said findings is contrary to the evidence, is contrary to the greater weight of the evidence, is unsupported by substantial evidence, is predicated upon alleged matters and facts outside the record in the cause; and for the reason that each of said findings con- [fol. 291] tains erroneous conclusions of law, not predicated upon any evidence in the cause.

63: Because the three-judge court erred in each and all of its conclusions of law.

64: Because the three-judge court erred in holding that any acts of this defendant shown by the evidence constituted contempt of said court, punishable by said court in this proceeding.

65: Because the three-judge court erred in its opinion in this cause in purporting to find in the first footnote to said opinion that this action was a proceeding incidental to American Insurance Co., et al, vs. Thompson, In Equity No. 270, when in fact this proceeding in contempt entitled United States of America, vs. Thomas J. Pendergast, et al., was a separate, independent criminal proceeding between the United States of America, plaintiff, and Thomas J. Pendergast, Robert Emmett [O'Mally] and A. L. McCormack, defendants, and was numbered 5040, said number being a number assigned to this cause on the criminal docket of the Central Division of the District Court of the United States for the Western District of Missouri, presided over by the Honorable John C. Collet, District Judge.

66: Because the three-judge court erred in its opinion in holding that bribery was committed by this defendant or any of these defendants, or that political influence was brought to bear by the delivery by this defendant of $440,000 for the reason that said purported finding and said

statement is unsupported by any evidence in the record in this cause, and is contrary to the evidence.

57: Because the three-judge court erred in finding in its opinions that this defendant committed acts in open court in the presence and face of the Court grossly to deceive and hoodwink the Judges constituting the Court, said findings being unsupported by any evidence in the [fol. 292] record in this cause, and contrary to the evidence; and if said finding was published in said opinions as a conclusion of law, said conclusion is erroneous and not predicated upon any evidence in the record.

58: Because the three-judge court erred in holding, finding and concluding in its opinions that this defendant or these defendants "prostituted the Court to their venal purposes and exposed its Judges to the possibility of disgrace and to certain humiliation," said finding, holding and conclusion being unsupported by any evidence in the record of this cause and contrary to any evidence in the record of this cause.

59: Because the three-judge court erred in finding, holding and concluding that they were guilty of the alleged misbehaviour, and in purporting to predicate a finding of guilt upon said alleged absence of a denial for the reason that said finding is not supported by the evidence, is contrary to the evidence and the pleadings in this cause, and ignores the issues.

60: Because the three-judge court erred in finding, holding and concluding in its opinion that this defendant and other defendants "stood on their technicalities", and erred in finding these defendants guilty of contempt of said three-judge court on said ground, said finding, holding and conclusion being in violation of this defendant's constitutional right guaranteed to him by Article V of the Amendments to the Constitution of the United States, which, in part, provides as follows:

> "No person shall be * * * compelled in any criminal case to be a witness against himself * * *",

in that the finding of guilt in said cause is based and predicated upon the failure of this defendant to testify in said cause.

61: Because the three-judge court erred in making a [fol. 293] purported finding in a footnote to its opinion as follows:

"The whole history of the criminal cases which resulted in the imposition of sentences on Pendergast and O'Malley for attempted evasion of income taxes, including much which throws light upon the background of the present proceeding in contempt, is set out in United States vs. Pendergast and O'Malley, 28 Fed. Supp. 601,"

for the reason that said purported finding is not based upon any evidence in this cause, is outside the record, and attempts to incorporate into this proceeding matters not in issue.

62: Because the three-judge court erred in erroneously construing the case of Nye and Mayers vs. United States of America, decided by the Supreme Court of the United States on April 10, 1941 and Reported in U.S. , 61 Sup. Ct. Rep. 810; 85 L. Ed. 733, 744 and in drawing unreasonable and unwarranted inferences therefrom, and in holding that said decision was not applicable to this proceeding.

63: Because the three-judge court erred in finding, holding and concluding that this defendant and the other defendants "sent their messengers (their innocent and unsuspecting messengers) to the very courtroom and into open court", said finding being unsupported by any evidence in the record in this cause and contrary to the evidence in the record in this cause.

64: Because the three-judge court erred in finding, holding and concluding in its opinion that the alleged "misbehavior of these defendants was committed, where it took effect and where it was intended to take effect"; said finding, holding and conclusion being unsupported by any evidence in the record in this proceeding, and contrary to any evidence in the record in this proceeding.

65: Because the three-judge court erred in its deduction that the facts allegedly proved that there was a conspiracy between Street, O'Malley, McCormack and Pendergast to obtain decrees disposing of the impounded fund, for the reason that said purported finding, conclu- [fol. 294] sion and deduction is contrary to the pleadings, unsupported by the evidence, and contrary to the evidence.

66: Because the three-judge court erred in its opinion in this cause in holding that the prosecution herein was not barred by the statute of limitations, for each and all of the following reasons: (1) because it appears from the

fact of the Information herein that said prosecution against this defendant is barred by the statute of limitations; (2) because under the evidence in the cause it appears that said prosecution is barred by the statute of limitations; (3) because each and all of the three-judge court's findings with reference to the statute of limitations are unsupported by the evidence and contrary to the undisputed evidence; (4) because it affirmatively appears from the evidence that the theory upon which the three-judge court held that the statute of limitations did not apply was erroneous in law and unsupported by the evidence.

67: Because the three-judge court erred in holding, finding and concluding that the alleged deception of this defendant and the other defendants continued the alleged misbehavior far beyond the actual entry of the decree in the insurance rate litigation, for the reason that said finding is unsupported by the evidence and is contrary to the undisputed evidence, and is erroneous in law.

68: Because the three-judge court erred in finding in its opinion that this defendant and the other defendants committed particular acts of "supplemental deception", said finding being unsupported by any evidence in the record in this cause and contrary to the evidence.

69: Because the three-judge court erred in its purported findings in its opinion to the effect that this defendant committed perjury before the Grand Jury, and [fol. 295] that said alleged perjury was committed as a result of an agreement between the defendants and was an affirmative act of deception, for the reason that said purported finding is unsupported by the evidence, is an erroneous conclusion, which is contrary to the evidence.

70: Because the three-judge court erred in finding and concluding that it could be reasonably inferred that this defendant and the other defendants had entered into an agreement with reference to this defendant's testimony before said Grand Jury, for the reason that said purported inference is unwarranted by the evidence, is contrary to the evidence, and was affirmatively destroyed by the undisputed and uncontradicted evidence offered on behalf of the Government.

71: Because the three-judge court erred in its opinion in holding, concluding and finding that the alleged acts of the defendant were calculated to stir the Court's resentment and anger, and that the stirring of the Court's

resentment and anger was the actual offense allegedly committed by this defendant and the other defendants, for the reason that said finding is erroneous in law, unsupported by the evidence, and contrary to the evidence.

72. Because the three-judge court erred in finding, holding and concluding that "There is no statute of limitations applicable to contempt committed 'In the presence of the Court' ", for the reason that said statement is an erroneous conclusion of law, and for the further reason that it affirmatively appears from the evidence in this cause that there was no contempt committed in the presence of the Court.

73. Because the three-judge court erred in finding, holding and concluding in its opinion that the statute of limitations did not begin to run in this case until the alleged deception practiced by the defendants ceased to have effect, nor until the last alleged affirmative act fortifying the alleged deception was committed by the al-
[fol. 296] leged conspirators or any of them, nor until the essence of the alleged contempt became an active principle by the alleged discovery of the truth, said conclusion being erroneous in law and unsupported by any evidence in the record, and being contrary to the evidence in the record.

74. Because the three-judge court erred in its opinion by finding that the United States District Attorney made an agreement with this defendant not to prosecute this defendant under the indictments for obstructing justice, and defrauding the United States Government mentioned in the evidence, and for this information in contempt of court, for the reason that there is no evidence of such an agreement between the said District Attorney and this defendant.

75. Because the three-judge court erred in its opinion by finding and holding on the issue of double jeopardy, that this defendant sought the dismissal of said indictments for conspiracy to obstruct justice and conspiracy to defraud the United States Government mentioned in the evidence, because of an agreement between the United States District Attorney and this defendant, so to do, for

the reason that said finding is unsupported by any evidence and is contrary to the evidence.

76: Because the three-judge court erred in finding, holding and concluding that this defendant and the other defendants "did everything conceivably possible to be done to avoid trial" under indictments returned in causes entitled United States of America, plaintiff vs. Thomas J. Pendergast, R. E. O'Malley and A. L. McCormack, defendants, No. 14912 and 14932, in the District Court of the United States for the reason that said finding is unsupported by any evidence in the record, and contrary to the evidence.

77: Because the three-judge court erred in making [fol. 297] purported findings of fact in its opinion, which said purported findings of fact were erroneous, misleading, and confusing and inconsistent with, and not supported by any evidence in the record in this cause, and containing conclusions of law not supported by the evidence in the record in this cause, and containing conclusions of law not supported by the evidence, and not predicated upon the evidence, said findings of fact serving no lawful or proper procedural function in a prosecution for criminal contempt.

78: The three-judge court erred in overruling defendant's motion for new trial and each separate assignment therein.

WHEREFORE, by reason whereof and on account of the grounds of appeal above assigned and cited, and of which complaint is herein made, defendant, A. L. McCormack, prays that the judgment and sentence of the court entered against defendant herein be reversed, set aside and for naught held.

Forest W. Hanna
Attorney for A. L. McCormack

Filed in the United States District Court June 7, 1941

[fol. 298] (Order Allowing Appeal to Defendant, A. L. McCormack.)

In the District Court of the United States of America for the Central Division of the Western District of Missouri United States of America, Plaintiff, vs. Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack, Defendants. No. 5,040. a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

Now on this 7th day of June, 1941, comes the defendant, A. L. McCormack, by his attorney, and presents his petition for an appeal, which said petition, together with Assignment of Errors intended to be urged by him, has been previously filed in the office of the clerk of this court, and petition praying that an appeal be allowed, that a writ of appeal issue; that a transcript of the record, proceedings, exhibits, upon which the judgment in said District Court was rendered, duly authenticated, be sent to the United States Circuit Court of Appeals for the Eighth Circuit; that a supersedeas and stay of proceedings pending the determination of said appeal be granted; and an order be made, relating to the security to be required of said defendant.

Now, upon consideration of said petition, it is ordered that an appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the judgment heretofore entered in said District Court, be, and the same is hereby allowed to the defendant; that a writ of appeal issue herein; that a certified transcript of testimony, exhibits, and all proceedings, be forthwith transmitted to the United States Circuit Court of Appeals, as aforesaid; [fol. 299] and that, upon the said defendant giving bond; according to law, in the sum of $2500.00, said defendant shall be allowed to appeal, and said bond shall act as a supersedeas and stay of execution, pending the determination of said appeal.

Kimbrough Stone
Circuit Judge
Albert L. Reeves
District Judge
Merrill E. Otis
District Judge

Filed in the United States District Court June 7, 1941

[fol. 300] (Notice of Appeal to Supreme Court of the United States by Defendant, Thomas J. Pendergast.)

In the District Court of the United States for the Central Division, Western District of Missouri. United States of America, Plaintiff, vs. Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, Defendants. No. 5040 A proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

Before Kimbrough Stone, Circuit Judge, Albert L. Reeves and Merrill E. Otis, District Judges.

Name and address of Appellant: Thomas J. Pendergast, 5650 Ward Parkway, Kansas City, Missouri.

Name and address of Appellant's Attorneys: R. R. Brewster, Federal Reserve Bank Building, Kansas City, Missouri. John G. Madden, 2400 Fidelity Bldg., Kansas City, Missouri. James E. Burke, 2400 Fidelity Bldg., Kansas City, Missouri.

Offense: Contempt of Court.

Date of Judgment: June 7, 1941.

Brief Description of Judgment or Sentence: Defendant found guilty of contempt of Court. Sentence:

Name of prison where now confined, if not on bail: Defendant now on bail.

I, the above named appellant, hereby appeal to the Supreme Court of the United States from the judgment above mentioned, on the grounds set forth below.

Thomas J. Pendergast
Appellant.

Dated June 11, 1941.

Service acknowledged above date

Richard K. Phelps, U. S. Atty and amicus curiae
By Charles F. Lamkin, Jr., Asst. U. S. Atty.

[fol. 301] GROUNDS OF APPEAL:

1.

Because the three-judge Court erred in failing to hold that under the pleadings, the law and the evidence, this defendant was not shown to be guilty of the offense sought to be charged in this proceeding.

2.

Because under the pleadings, the law and the evidence this defendant is entitled to judgment, and the three-judge Court erred in failing to render judgment on behalf of this defendant.

3.

Because the three-judge Court erred in failing to find the defendant not guilty of contempt of Court under the pleadings, the law and the evidence.

4.

Because the three-judge Court erred in not finding under the pleadings, the law and the evidence, that this defendant was not shown to be guilty of contempt which the three-judge Court had power or authority to punish.

5.

Because the three-judge Court was without jurisdiction to entertain, hear or determine this proceeding and erred in not so holding.

[fol. 302]

6.

Because the three-judge Court erred in assuming jurisdiction to entertain, hear or determine this proceeding in contempt, or to try or convict this defendant of the defense sought to be charged.

7.

Because the three-judge Court erred in assuming jurisdiction to punish this defendant for the alleged contempt sought to be charged.

8.

Because the three-judge Court was illegally convened at the inception of the insurance rate litigation mentioned

in evidence (American Insurance Co. vs. Joseph B. Thompson, Superintendent of Insurance for the State of Missouri, et al., No. 270 In Equity, and companion cases bearing Docket Nos. 271 to 426, Incl.) and did not lawfully acquire jurisdiction therein.

9.

Because the three-judge Court was without jurisdiction to entertain, consider, approve or disapprove the purported settlement or stipulation of settlement of the insurance rate litigation mentioned in evidence, and erred in assuming, undertaking or entertaining such jurisdiction.

10.

Because the three-judge Court was without jurisdiction to disburse or supervise the disbursement of impounded funds mentioned in evidence.

[fol. 303]

11.

Because the purported settlement of the insurance rate litigation mentioned in evidence was a nullity and not susceptible of approval or enforcement by the three-judge Court, and the three-judge Court erred in holding that said matter was within its jurisdiction.

12.

Because, if the three-judge Court acquired jurisdiction of the insurance rate litigation mentioned in evidence (which this defendant denies) under the colorable averments of the bills filed, such jurisdiction was lost prior to the proceedings in said litigation relating to the purported settlement thereof; and that said Three-Judge Court thereafter had no power or authority under the law to act therein.

13.

Because, prior to the proceeding in the insurance rate litigation relating to the purported settlement thereof, the three-judge Court and the litigants in said insurance rate litigation recognized the constitutionality of the State statute assailed in the bills in equity therein, and were proceeding solely upon the theory that the action of the Superintendent of Insurance of the State of Missouri un-

der constitutional statutes was confiscatory; as a result, any jurisdiction it may have theretofore acquired was thereupon lost and the Three-Judge Court erred in proceeding thereafter, and was acting contrary to the terms and provisions of the Statutes of the United States authorizing the calling of a Three-Judge Court.

[fol. 304]

14.

Because the three-judge Court under the statutes in such cases made and provided, could have acquired no jurisdiction in the insurance rate litigation mentioned in evidence other than to grant or deny injunctive relief sought on the ground of the unconstitutionality of a State statute or State statutes; and that in purporting to entertain, hear, consider, approve and enforce the purported settlement of said insurance rate litigation, in whole or in part, the three-judge Court was acting extrajurisdictionally and its action was a nullity and void; and the three-judge Court erred in continuing to assert jurisdiction thereafter.

15.

Because the bills in equity filed by the insurance companies in the insurance rate litigation mentioned in evidence failed to state a cause of action, were not petitions or bills to review the action of the Superintendent of Insurance complained of, did not justify or authorize injunctive relief or any relief by the three-judge Court, were insufficient to authorize the creation or formation of a three-judge Court, and said three-judge Court sought to be convened, acquired no lawful jurisdiction and said three-judge Court erred in asserting jurisdiction or proceeding in said causes.

16.

Because the three-judge Court erred in charging this defendant with notice of the terms of the purported settlement, or that said purported settlement would be reduced to a written agreement and presented to the three-judge Court for its approval, or that said three-judge Court would act thereon, when such settlement was a nullity [fol. 305] and when said three-judge Court was without jurisdiction or authority to act thereon.

17.

Because the three-judge Court erred in asserting jurisdiction to direct the disbursement of the impounded funds mentioned in evidence in accordance with the purported settlement of said insurance rate litigation, or in taking any action thereon.

18.

Because the three-judge Court at the time of the alleged contempt charged herein was not a lawfully constituted court or exercising any lawful or constitutional or statutory jurisdiction, and its proceedings were erroneous and extrajurisdictional.

19.

Because at the time of the institution of this proceeding the three-judge Court was not a lawfully constituted court or exercising any lawful or constitutional jurisdiction, and the three-judge Court erred in attempting to assert jurisdiction herein.

20.

Because the three-judge Court, convened as a court of limited statutory jurisdiction, was without authority or jurisdiction to entertain, hear or determine this proceeding.

21.

Because this proceeding was and is an independent action at law and not a part of the original proceeding in equity over which the three-judge Court was attempting [fol. 306] to assert jurisdiction; and said three-judge Court therefore was without jurisdiction herein.

22.

Because this proceeding is a prosecution for alleged criminal contempt and the three-judge Court is vested with no jurisdiction thereover.

23.

Because this proceeding was neither instituted nor maintained for the benefit of any litigant in the insurance rate litigation mentioned in evidence, or to coerce or com-

pel obedience to any order, ruling, decree, or other purported exercise of jurisdiction by the three-judge Court in said litigation, but solely to punish for past acts allegedly contemptuous of said Court, and said three-judge Court, vested at most with jurisdiction (which defendant denies) for limited purposes in said original proceeding in equity, was without jurisdiction, power or authority so to punish.

24.

Because, if this proceeding could lawfully be maintained (which this defendant denies), jurisdiction therein was vested in the District Court for the Central Division of the Western District of Missouri, presided over by Honorable John C. Collet, District Judge, and not in the Three-Judge Court which purported to exercise jurisdiction in this cause.

25.

Because the information filed herein fails to state a cause of action against this defendant.

[fol. 307]

26.

Because the information filed in this proceeding shows upon its face that it is barred by the statute of limitations and that the alleged contemptuous acts asserted therein occurred more than three years next before the institution of said proceeding.

27.

Because the information shows that the alleged contemptuous acts sought to be charged against this defendant could not and did not constitute (a) contempt of court, (b) contempt of said three-judge Court, (c) contempt of said three-judge Court which said three-judge Court had power, jurisdiction or authority to punish, or (d) contempt of said Court, which said Court had power or jurisdiction or authority to punish by summary process or by any procedure other than indictment.

28.

Because the information shows upon its face that the three-judge Court was without jurisdiction in this action.

29.

Because the maintenance of this prosecution subjected this defendant to double jeopardy in violation of the Fifth Amendment to the Constitution of the United States, in that this defendant had heretofore been prosecuted for the alleged offense or offenses sought to be charged in this proceeding under the indictments mentioned in evidence (United States v. Thomas J. Pendergast, R. E. O'Malley and A. L. McCormack, No. 14912 and 14932, in the District Court of the United States for the Western Division of the Western District of Missouri), which said indictments were duly consolidated for trial and a jury [fol. 308] duly empanelled and sworn, and the United States thereafter dismissed said indictments and this defendant was acquitted and discharged thereunder, thereby having been acquitted of the offense or offenses charged in this proceeding; and the three-judge Court erred in failing to so hold.

30.

Because this defendant has been prosecuted by the United States for the alleged offense or offenses sought to be charged in this proceeding under the indictments mentioned in evidence, which said indictments were consolidated for trial and a jury duly empanelled and sworn, and the United States thereafter dismissed said indictments and this defendant was acquitted and discharged thereunder, thereby having been acquitted of the offense or offenses sought to be charged in the information herein.

31.

Because under the evidence it appears that this prosecution was barred by the statute of limitations and that said prosecution was not instituted or the information filed within three years next after the occurrence of the alleged contemptuous acts, and the three-judge Court erred in failing to so find.

32.

Because the evidence on the trial before the three-judge Court failed to show (a) that defendant was guilty of the offense charged or sought to be charged; (b) that the defendant was guilty of contempt of court; (c) that the defendant was guilty of contempt of said three-judge

Court; (d) that defendant was guilty of contempt of said three-judge Court, which said Court had power or authority to punish; (e) that defendant was guilty of con-[fol. 309] tempt of said three-judge Court, which said District Court had power or authority to punish by summary process or by information or by procedure other than indictment; and the said three-judge Court erred in failing to so find.

33.

Because the acts charged against defendant and shown by the evidence did not constitute (a) contempt, (b) contempt of the three-judge Court, (c) contempt of the three-judge Court, which said Court had power or authority to punish, (d) contempt of said Court, which said Court had power or authority to punish in this proceeding or otherwise than by indictment.

34.

Because the evidence failed to show that this defendant was guilty of any act in law contemptuous of the three-judge Court; and said Court erred in failing to find the defendant not guilty.

35.

Because this defendant could not properly be charged with the act or acts of others in allegedly inducing action on the part of the three-judge Court, or expressly or by implication perpetrating a fraud upon said Court, when there was no evidence that this defendant was a party thereto or knew or anticipated that any action would or was to be thus induced or any fraud so perpetrated; and no conspiracy was charged in the information or shown by the evidence; and the three-judge Court erred in charging this defendant with any act or acts of others in said particulars.

[fol. 310] 36.

Because the evidence failed to show this defendant guilty beyond a reasonable doubt; and the three-judge Court erred in its finding of guilt.

37.

Because the character of the Government's proof was such as to be insufficient to warrant a finding of guilt

beyond reasonable doubt; and the three-judge Court erred in so finding.

38.

Because this prosecution was barred by reason of the agreement not to prosecute shown in the evidence, which said agreement was made between this defendant and the United States whereby and whereunder this defendant entered a plea of guilty mentioned in evidence in the income tax case mentioned in evidence, and served the sentence thereupon imposed; and the three-judge Court erred in failing to find that said prosecution was barred by reason of said agreement, and in purporting to find that said prosecution was not barred by reason of said agreement.

39.

Because the members of the three-judge Court who purported to act in this cause were in fact disqualified in said proceeding, and in acting therein deprived this defendant of liberty and property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

[fol. 311]

40.

Because there was no evidence that this defendant was a party to the actual settlement agreed upon in the insurance rate case or to any act or acts of others in connection with such settlement, or in the approval thereof; and the three-judge Court erred in making each finding made in connection therewith.

41.

Because there was no evidence in this cause that this defendant participated in any act or acts contemptuous of the three-judge Court, or was chargeable with any intent or design so to do.

42.

Because there was no evidence that this defendant was a party directly or indirectly to the compromise or settlement of the insurance rate litigation actually executed; and the three-judge Court erred in its findings in connection therewith.

43.

Because there was no evidence that this defendant was a party directly or indirectly to the stipulation of settlement mentioned in evidence; and said three-judge Court erred in its findings with reference thereto.

44.

Because there was no evidence that this defendant was a party directly or indirectly to any presentation of the stipulation of settlement mentioned in evidence, to the three-judge Court for its approval (if there was evidence of such presentation which defendant denies), or to the motion for decree mentioned in evidence, or to any action [fol. 312] taken to obtain the approval of said Court to said stipulation, or to induce any action on the part of said Court with reference thereto (if there is evidence of any such action, which defendant denies); and the three-judge Court erred in its findings in connection therewith.

45.

Because there was no evidence that there was any agreement between the defendants herein and Charles R. Street or between this defendant and any of the other defendants to the effect that they or any of them would keep the alleged transactions between them unknown to, or concealed from the said three-judge Court, or that by affirmative acts of concealment or silence they or any of them would prevent said Court from obtaining knowledge or information with reference thereto; and the evidence of the Government in the trial of said cause was affirmatively to the contrary; and that by reason thereof the Government cannot rely upon any inference or presumption with reference to any such alleged agreement; and the Government is entitled to no such inference or presumption for the further reason that the evidence was undisputed that this defendant was not a party to any such agreement of any kind or character; and by reason of the facts aforesaid the three-judge Court erred in making its finding of guilt and in finding the existence of such an agreement, and in making each and all of its findings in connection with such alleged agreements.

46.

Because there was no evidence of any concealment by A. L. McCormack before the United States Grand Jury

of any facts relating to the settlement of the insurance [fol. 313] rate litigation mentioned in evidence and there was no evidence that any such alleged concealment was in furtherance of, or pursuant to any agreement whatsoever, and particularly to any agreement to which this defendant was ever a party; and the evidence of the Government affirmatively disproved any such contention; and said alleged concealment of perjury could not bind this defendant or be competent against him or constitute the basis for any finding against him; and that by reason thereof the three-judge Court erred in failing to find the defendant not guilty, and in failing to find that this action was barred by the statute of limitations; and further erred in making each and every finding which was made by said Court in connection with said alleged Grand Jury testimony.

47.

Because there was no evidence that any alleged communication between the defendant R. E. O'Malley and defendant A. L. McCormack during the course of the grand jury inquiry mentioned in evidence was at the instance or request of this defendant, or pursuant to, or in furtherance of any agreement to which this defendant was a party; and the three-judge Court erred in making its finding of guilt and in failing to hold that this action was barred by the statute of limitations; and erred because said alleged communication could not in law be binding upon or competent against this defendant and could not in law constitute the basis of any finding against this defendant; and further erred in the making of each finding made in connection with said alleged communication or communications.

48.

Because there was not sufficient evidence to warrant a finding of guilt against this defendant; and the three-judge Court erred in making such finding.

[fol. 314]

49.

Because there was no evidence sufficient to establish the offense charged or sought to be charged; and the three-judge Court erred in connection with each and every finding made in connection therewith.

50.

Because there was no evidence sufficient to establish that this defendant was a party to any act contemptuous of the three-judge Court; and the three-judge Court erred in making its finding of guilt.

51.

Because the evidence of the Government, binding upon the Government, affirmatively established the non-participation of this defendant in any act allegedly contemptuous of the three-judge Court; and the three-judge Court erred in failing to so find.

52.

Because there was no evidence sufficient to establish the necessary elements and ingredients of the offense sought to be charged; and the three-judge Court erred in making its finding of guilt.

53.

Because there was no evidence sufficient to establish any offense on the part of this defendant committed within the jurisdiction of the three-judge Court; and the three-judge Court erred in making its finding of guilt for said reason.

[fol. 315]

54.

Because there was no evidence sufficient to establish criminal intent on the part of this defendant; and the three-judge Court erred in failing to so find.

55.

Because there was no evidence sufficient to establish contemptuous intent upon the part of this defendant; and the three-judge Court erred in its finding of guilt.

56.

Because there was no evidence sufficient to establish that this defendant was guilty of misbehavior in the presence of the three-judge Court, or so near thereto as to obstruct the administration of justice; and the three-judge Court erred in finding this defendant guilty.

57.

Because the three-judge Court erred in overruling and denying and failing to sustain the motion of this defendant to abate and quash the information filed in said Court, and to withdraw the rule to show cause for each and all of the reasons therein appearing.

58.

Because the three-judge Court erred in overruling and denying, and in failing to sustain the motion of this defendant at the close of the evidence of the United States to declare this defendant not guilty and to dismiss this proceeding, for each and all of the reasons therein appearing, and for each and all of the grounds therein stated.

[fol. 316] 59.

Because the three-judge Court erred in overruling and denying, and failing and refusing to sustain the motion of this defendant at the close of all the evidence to declare this defendant not guilty, and to dismiss this proceeding, for each and all of the reasons contained in said motion.

60.

Because the three-judge Court erred in admitting and receiving, over the objection and exception of this defendant, incompetent, irrelevant and immaterial evidence.

61.

Because the three-judge Court erred in excluding, over the exceptions of this defendant, competent, material and relevant evidence duly offered by this defendant.

62.

Because the three-judge Court erred in overruling and in failing and refusing to sustain motions to strike incompetent, irrelevant and immaterial evidence, which said motions were duly made by this defendant.

63.

Because the three-judge Court erred in overruling, and in failing and refusing to sustain motions duly made by this defendant to limit and restrict the effect of purported evidence.

64.

Because the findings, opinions and judgment of the three-judge Court are against the law and the evidence.

[fol. 317]

65.

Because the findings, opinions and judgment of the Court, and each part thereof, are unsupported by substantial evidence.

66.

Because the findings, opinions and judgment of the three-judge Court are against the greater weight of the evidence.

67.

Because the three-judge Court erred in failing and refusing to make each of the findings of fact duly requested by this defendant.

68.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

1. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, discussed with anyone or had any connection with or anything to do with the attempted settlement of the so-called insurance rate litigation.

69.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

2. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, had any knowledge of or anything to do with the agreement of settlement of the so-called insurance rate litigation.

[fol. 318]

70.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

3. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, had anything to do with

or any knowledge of the motion for decree filed in the three-judge Court.

71.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

4. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, knew that cases involving the so-called insurance rate litigation were pending in the three-judge Court.

72.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

5. The Court finds that the defendant, Thomas J. Pendergast, was never in the presence of said three-judge Court.

73.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

6. The Court finds that the defendant, Thomas J. Pendergast, was never in the presence of the three-judge Court in connection with the so-called insurance rate liti- [fol. 319] gation or the proposed settlement thereof.

74.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

7. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, knew of or had anything to do with the application for an order, or the issuance thereof by the three-judge Court, in said insurance rate litigation, or in connection with the distribution of the impounded funds.

75.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

8. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, received any money from one Charles R. Street, or from anyone else, in connection with said insurance rate matter or litigation after October, 1936.

76.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

9. The Court finds that the decree providing for the dismissal of said insurance rate litigation and the distribution of the impounded funds was made on February 1st, 1936.

[fol. 320]

77.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

10. The Court finds that there is no evidence or proof from which a presumption may arise that the defendant, Thomas J. Pendergast knew of the terms of the proposed settlement of said insurance rate litigation.

78.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

11. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, was guilty of misbehavior in the presence of the Court that interfered with the order or decorum of said Court or interfered with the business or proceedings thereof.

79.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

12. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, was guilty of misbehavior in the presence of the Court or so near thereto as to obstruct the administration of justice.

80.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

[fol. 321] 13. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, committed any act of contempt of said three-judge Court.

81.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defenant as follows (to which action defendant excepted):

14. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, committed any act of contempt of said three-judge Court within three years of the filing of the information herein.

82.

The three-Judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

15. The Court finds that there is no evidence showing or tending to show that the defendant, Thomas J. Pendergast, bribed the defendant, R. E. O'Malley in connection with said insurance rate litigation or the settlement or disposition thereof.

83.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

16. The Court finds that there is no evidence to sustain the following allegation of the information: "At all times hereinbefore mentioned, the defendants, and each of them, agreed with and between each other that they [fol. 322] would keep all of the transactions hereinbefore enumerated between Charles R. Street, T. J. Pendergast-R. E. O'Malley and A. L. McCormack unknown to and concealed from this Honorable Court and that, by affirmative acts of concealment and silence, they would prevent the Court from having any knowledge or any information whatever concerning the fraudulent and corrupt transactions between Charles R. Street and the defendants,

T. J. Pendergast, R. E. O'Malley and A. L. McCormack, and that it was their design, purpose and intent, by means aforesaid and by affirmative acts of concealment, to induce and procure a decree of this Honorable Court, and to have the same continued in force, distributing the impounded monies in accordance with the compromise agreed upon at the conference in the Muehlebach Hotel in Kansas City, Missouri, hereinbefore referred to".

84.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

17. The Court finds that the evidence given by A. L. McCormack before the Federal Grand Jury had no connection in any way with the proposed settlement or settlement of the insurance rate litigation or the alleged connection of the defendants therewith.

85.

The three-judge Court erred in failing and refusing to made the finding of fact requested by this defendant as follows (to which action defendant excepted):

[fol. 323] 18. The Court finds that, under all the evidence in the case, the defendant, Thomas J. Pendergast, did not commit a contempt of this Court.

86.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

19. The Court finds that there is no evidence that this defendant, Thomas J. Pendergast, was a party, directly or indirectly, to the compromise and settlement of the insurance rate litigation.

87.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

20. The Court finds that there is no evidence that this defendant, Thomas J. Pendergast, was a party, directly or

indirectly, to the stipulation of settlement aforesaid filed in this Court.

88.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

21. The Court finds that there is no evidence that this defendant, Thomas J. Pendergast, was a party, directly or indirectly, to the presentation of such stipulation of settlement to this Court for its approval, or to the motion for decree therein filed, or to any action taken to obtain the approval of this Court, or to induce the action of this Court [fol. 324] with reference thereto.

89.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

22. The Court finds that there is no evidence that the defendant, Thomas J. Pendergast, knew or had any notice that the proposed settlement would be presented to this Court for its approval or that this Court would act thereon and that the said Thomas J. Pendergast cannot be charged with such notice for the reason that this Court was without jurisdiction or authority to act in such matter.

90.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

23. The Court finds, from the evidence, that the maintenance of this prosecution subjects the defendant, Thomas J. Pendergast, to double jeopardy in violation of the Fifth Amendment to the Constitution of the United States, in that this defendant has heretofore been prosecuted for the alleged offense or offenses sought to be charged in this proceeding under the indictments mentioned in evidence. The said indictments were duly consolidated for trial; a jury was duly empanelled and sworn and the United States thereafter dismissed such indictments and this defendant was acquitted and discharged thereunder; that he has been and is thereby acquitted of

the offense or offenses now sought to be charged herein; that the facts and charges set forth in said indictments [fol. 325] were identical with the facts and charges set forth in the information herein; and that the identical evidence necessary to convict under said indictments would be necessary to convict under the information herein.

91.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

24. The Court finds that the allegations in the Bills, original, amended and supplemental, filed by the insurance companies in the insurance rate litigation purported to attack the constitutionality of the Missouri Insurance Statutes; that said allegations were wholly without foundation, at most colorable, and that said allegations were subsequently abandoned and said litigation proceeded solely upon the question of the alleged confiscatory character of the orders of the Superintendent of Insurance and that this Court had no jurisdiction to entertain or pass upon said matter and no jurisdiction to collect or distribute the impounded funds or to enter any order approving or recognizing the settlement of said litigation.

92.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

25. The Court finds that, under the evidence, it had no jurisdiction to entertain the insurance rate litigation.

[fol. 326]

93.

The three-judge Court erred in failing and refusing to make the finding of fact requested by this defendant as follows (to which action defendant excepted):

26. The Court finds that, under the evidence, it has no jurisdiction to entertain the proceedings herein or to try this defendant, Thomas J. Pendergast, for contempt.

94.

Because the three-judge Court erred in failing and refusing to declare this defendant not guilty for each of the

reasons specified in the motion of this defendant filed at the close of all the evidence, to declare this defendant not guilty and to dismiss the proceedings.

95.

Because the three-judge Court erred in making and entering its first finding of fact (which said finding is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside the record of this cause, which said finding was made over the objection and exception of this defendant.

96.

Because the three-judge Court erred in making and entering its second finding of fact (which said finding of fact is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by any evidence and is predicated upon alleged matters and facts outside the rec- [fol. 327] ord in this cause; and for the further reason that it contains broad and sweeping conclusions of law not predicated upon any evidence in the cause, which said finding was made over the objection and exception of this defendant.

97.

Because the three-judge Court erred in making and entering, over the objection and exception of this defendant, its third finding of fact (which said finding is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence and is predicated upon alleged matters and facts outside of the record in this cause; and for the further reason that it contains broad and sweeping conclusions of law not predicated upon any evidence in the cause.

98.

Because the three-judge Court erred in making and entering its third finding of fact for the reason that said finding of fact purports to find that this defendant and the other defendants entered into a conspiracy to present to the District Court in open court a purportedly fake

settlement and to grossly deceive said District Court by the alleged lying, false and fraudulent representations allegedly made in open court at the instance of defendant, which said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, or any evidence, and is predicated upon alleged matters and facts outside the record in this cause, and contains broad and general conclusions of law not [fol. 328] predicated upon any evidence in this cause, and was made over the objection and exception of this defendant.

99.

Because the three-judge Court erred in making and entering, over the objection and exception of this defendant, its fourth finding of fact (which said finding is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside the record in this cause; and for the further reason that said finding contains broad and general conclusions of law not predicated upon any evidence in this cause.

100.

Because the three-judge Court erred in making, over the objection and exception of this defendant, each and every finding of fact made by said Court, whether made in said formal findings of fact or elsewhere in said opinions, or made in its judgment of conviction for the reason that each of said findings is contrary to the evidence, is contrary to the greater weight of the evidence, is unsupported by substantial evidence, is predicated upon alleged matters and facts outside the record in the cause; and for the reason that each of said findings contains erroneous conclusions of law; not predicated upon any evidence in the cause.

101.

Because the three-judge Court erred in each and all of its conclusions of law.

[fol. 329]

102.

Because the three-judge Court erred in holding in its opinions that it possessed jurisdiction to entertain this proceeding in criminal contempt.

103.

Because the three-judge Court erred in its opinions, findings and judgment of conviction that it possessed jurisdiction to punish for the alleged criminal contempt sought to be charged in the information herein.

104.

Because the three-judge Court erred in holding in its findings, opinions and judgment that any acts of this defendant constituted contempt of said District Court.

105.

Because the three-judge Court erred in holding that any acts of this defendant shown by the evidence constituted contempt of said Court, punishable by said Court in this proceeding.

106.

Because the three-judge Court erred in its findings, opinions and judgment that this proceeding was incidental or ancillary to the so-called insurance rate litigation cases, and in failing to find that this proceeding was an independent proceeding for prosecution for criminal contempt.

107.

Because the three-judge Court erred in holding that this proceeding entitled United States of America vs. Thomas J. Pendergast, et al., No. 5040, an action in criminal [fol. 330] contempt, was incidental or ancillary to the so-called insurance rate litigation which was a proceeding in equity.

108.

Because the three-judge Court erred in failing and refusing to hold that said Court (even if lawfully convened) was without jurisdiction to entertain, hear or determine a prosecution for criminal contempt initiated on information on the part of the United States against this defendant.

109.

Because the three-judge Court erred in its opinion in this cause in purporting to find in the first footnote to said opinion that this action was a proceeding incidental

to American Insurance Co., et al., vs. Thompson, In Equity No. 270, when in fact this proceeding in contempt entitled United States of America vs. Thomas J. Pendergast et al., was a separate, independent proceeding between the United States of America, plaintiff, and Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, defendants, and was numbered 5040, said number being a number assigned to this cause on the criminal docket of the Central Division of the District Court of the United States for the Western District of Missouri, presided over by the Honorable John C. Collet, District Judge.

110.

Because the three-judge Court erred in its opinion in holding that bribery was committed by this defendant or any of these defendants, or that political influence was brought to bear by the payment to this defendant of $440,- [fol. 331] 000 for the reason that said purported finding and said statement is unsupported by any evidence in the record in this cause, and is contrary to the evidence.

111.

Because the three-judge Court erred in finding in its opinion that these defendants, allegedly conspirators, committed acts in open court in the presence and face of the Court grossly to deceive and hoodwink the Judges constituting the Court, said finding being unsupported by any evidence in the record in this cause, and contrary to the evidence; and if said finding was published in said opinion as a conclusion of law, said conclusion is erroneous and not predicated upon any evidence in the record.

112.

Because the three-judge Court erred in holding, finding and concluding in its opinion that this defendant or these defendants "prostituted the Court to their venal purposes and exposed its Judges to the possibility of disgrace and to certain humiliation", said finding, holding and conclusion being unsupported by any evidence in the record of this cause and contrary to any evidence in the record of this cause.

113.

Because the three-judge Court erred in finding, holding and concluding that these defendants never denied that

they were guilty of the alleged misbehavior, and in purporting to predicate a finding of guilt upon said alleged absence of a denial for the reason that said finding is not [fol. 332] supported by the evidence, is contrary to the evidence and the pleadings in this cause, and ignores the issues, and deprives this defendant of rights guaranteed to him by Article V of the amendments to the Constitution of the United States, which Article provides in part:

"No person shall be * * * compelled in any criminal case to be a witness against himself * * *.

"No person shall be deprived of life, liberty or property without due process of law."

in that the finding of guilt in said cause is based upon the failure of this defendant to testify in said cause.

114.

Because the three-judge Court erred in finding, holding and concluding in its opinion that this defendant and other defendants "stood on their technicalities", and erred in finding these defendants guilty of contempt of said Court on said ground, said finding, holding and conclusion being in violation of this defendant's constitutional right guaranteed to him by Article V of the amendments to the Constitution of the United States, which, in part, provides as follows:

"No person shall be * * * compelled in any criminal case to be a witness against himself * *.

"No person shall be deprived of life, liberty or property without due process of law."

in that the finding of guilt in said cause is based upon the failure of this defendant to testify in said cause.

115.

Because the three-judge Court erred in making a purported finding in a footnote to its opinion as follows:

"The whole history of the criminal cases which resulted in the imposition of sentences on Pendergast and O'Malley for attempted evasion of income taxes, including much which throws light upon the background of [fol. 333] the present proceeding in contempt, is set out in United States vs. Pendergast and O'Malley, 28 Fed. Supp. 601."

for the reason that said purported finding is not based upon any evidence in this cause, is outside the record, and attempts to incorporate into this proceeding matters outside the record.

116.

Because the three-judge Court erred in holding, finding and concluding in its opinion that this defendant confessed any alleged misbehavior or that this defendant had as well confess any alleged misbehavior; said finding being unsupported by any evidence in the record, and contrary to any evidence in the record; and in basing its opinion of guilt upon said finding, the three-judge Court thereby deprived defendant of his life and liberty without due process of law in violation of Article V of the amendments to the Constitution of the United States of America, which said Article provides in part as follows:

"No person shall be * * * compelled in any criminal case to be a witness against himself * * *.

"No person shall be deprived of life, liberty or property without due process of law."

in that the finding of guilt in said cause is based upon the failure of this defendant to testify in said cause.

117.

Because the three-judge Court erred in erroneously construing the case of Nye and Mayers vs. United States of America, decided by the Supreme Court of the United States on April 10, 1941 and reported in 85 L. Ed. 733, and in drawing unreasonable and unwarranted inferences therefrom, and in holding that said decision was not ap- (fol. 334) plicable to this proceeding.

118.

Because the three-judge Court erred in finding, holding and concluding that this defendant and the other defendants "sent their messengers (their innocent and unsuspecting messengers) to the very courtroom and into open court", said finding being unsupported by any evidence in the record in this cause and contrary to the evidence in the record in this cause.

119.

Because the three-judge Court erred in finding, holding and concluding in its opinion that the alleged "misbe-

havior of these defendants was committed where it took effect and where it was intended to take effect"; said finding, holding and conclusion being unsupported by any evidence in the record in this proceeding, and contrary to any evidence in the record in this proceeding.

120.

Because the three-judge Court erred in its opinion in failing and refusing to consider the contention of this defendant that a three-judge court had no jurisdiction, power or authority to entertain this proceeding in criminal contempt.

121.

Because the three-judge Court erred in finding, holding and concluding in its opinion that the alleged "whole transaction was for the express purpose of effecting a settlement of the insurance litigation"; said finding, holding and conclusion being unsupported by any evidence in the record in this cause and contrary to the evidence in the record in this cause.

[fol. 335] 122.

Because the three-judge Court erred in its deduction that the facts allegedly proved that there was a conspiracy between Street, O'Malley, McCormack and this defendant to obtain decrees disposing of the impounded fund, for the reason that said purported finding and deduction is not within the pleadings, unsupported by the evidence, and contrary to the evidence.

123.

Because the three-judge Court erred in its opinion in this cause in holding that the prosecution herein was not barred by the statute of limitations, for each and all of the following reasons: (1) because it appears from the face of the information herein that said prosecution against this defendant is barred by the statute of limitations; (2) because under the evidence in the cause it appears that said prosecution is barred by the statute of limitations; (3) because each and all of the three-judge Court's findings with reference to the statute of limitations are unsupported by the evidence and contrary to the undisputed evidence; (4) because it affirmatively appears

from the evidence that the theory upon which the three-judge Court held that the statute of limitations did not apply was erroneous in law and unsupported by the evidence.

124.

Because the three-judge Court erred in holding, finding and concluding that the alleged deception of this defendant and the other defendants continued the alleged misbehavior far beyond the actual entry of the decree in the insurance rate litigation, for the reason that said finding is unsupported by the evidence and is contrary to the undisputed evidence, and is erroneous in law.

125.

Because the three-judge Court erred in finding in its opinion that this defendant and the other defendants committed particular acts of "supplemental deception", said finding being unsupported by any evidence in the record in this cause and contrary to the evidence.

[fol. 336]

126.

Because the three-judge Court erred in its purported findings in its opinion to the effect that McCormack committed perjury before the Grand Jury, and that said alleged perjury was committed as a result of an agreement between the defendants and was an affirmative act of deception, for the reason that said purported finding is unsupported by the evidence and is an erroneous conclusion of law which is contrary to the evidence.

127.

Because the three-judge Court erred in finding that it could be reasonably inferred that this defendant and the other defendants had entered into an agreement with reference to McCormack's testimony before said Grand Jury, for the reason that said purported inference is unwarranted by the evidence, is contrary to the evidence, and was affirmatively destroyed by the undisputed and uncontradicted evidence offered on behalf of the Government.

128.

Because the three-judge Court erred in its opinion in holding, concluding and finding that the alleged

acts of the defendant were calculated to stir the Court's resentment and anger, and that the stirring of the Court's resentment and anger was the actual offense allegedly committed by this defendant and the other defendants, for the reason that said finding is erroneous in law, unsupported by the evidence, and contrary to the evidence.

129.

Because the three-judge Court erred in finding, holding and concluding that "There is no statute of limitations applicable to contempt committed 'in the presence of the Court' ", for the reason that said statement is an erroneous [fol. 337] conclusion of law, and for the further reason that it affirmatively appears from the evidence in this cause that there was no contempt committed in the presence of the Court.

130.

Because the three-judge Court erred in finding, holding and concluding in its opinion that the statute of limitations did not begin to run in this case until the alleged deception practiced by the defendants ceased to have effect, nor until the last alleged affirmative act fortifying the alleged deception was committed by the alleged conspirators, or any of them, nor until the essence of the alleged contempt became an active principle by the alleged discovery of the truth, said conclusion be erroneous in law and unsupported by any evidence in the record, and being contrary to the evidence in the record.

131.

Because the three-judge Court erred in its opinion in holding that this defendant had not been subjected to double jeopardy by reason of the previous prosecution and acquittal of this defendant in Causes No. 14912 and 14932 in the District Court of the United States entitled United States of America, plaintiff, vs. Thomas J. Pendergast, R. E. O'Malley and A. L. McCormack, defendants, for the reason that said purported finding that the maintenance of this prosecution did not constitute double jeopardy is contrary to the undisputed evidence, and the conclusions of the Court in connection therewith are unsupported by the evidence, erroneous in law, and contrary to the record

[fol. 338] entries, verdicts and judgment in the causes hereinabove mentioned.

132.

Because the three-judge Court erred in its opinion in purporting to find that the agreement between the United States of America and this defendant, made and entered into prior to the entering of the plea of guilty in the income tax case mentioned in evidence, did not entitle the defendant to a dismissal of this cause, for the reason that said finding is contrary to the terms and provisions of said agreement, contrary to the undisputed evidence in the cause, contrary to the judicial admissions made by the Government in the trial of this cause in open court, and contrary to the stipulations shown in the record in this cause.

133.

Because the three-judge Court erred in its opinion by finding, holding and concluding that the United States District Attorney only made known the agreement not to further prosecute this defendant at the instance and request of counsel for this defendant and the other defendants, and until after this defendant and defendant O'Malley had been sentenced, and the term had passed, and after sentence could not be changed, and in purportedly finding that said United States District Attorney did not intend or contemplate that said agreement would extend to this proceeding in contempt, for the reason that said finding is contrary to the undisputed evidence in the cause and is unsupported by any evidence, and constitutes an unwarranted purported interpretation of the agreement shown by the evidence.

[fol. 339] 134.

Because the three-judge Court erred in finding, holding and concluding that this defendant and the other defendants "did everything conceivably possible to be done to avoid trial" under indictments returned in causes entitled United States of America, plaintiff, vs. Thomas J. Pendergast, R. E. O'Malley and A. L. McCormack, defendants, No. 14912 and 14932, in the District Court of the United States for the Western Division of the Western District of Missouri, for the reason that said finding is unsup-

ported by any evidence in the record, and contrary to the evidence.

135.

Because the three-judge Court erred in failing and refusing to give effect to the agreement mentioned in evidence between the United States, acting through the District Attorney, and this defendant, either by abating this prosecution or staying proceedings herein, or sentence herein, pending an application to the Executive for clemency and the action of the Executive thereon.

136.

Because the three-judge Court erred in overruling the motion for new trial filed herein by defendant Thomas J. Pendergast and erred in failing to sustain said motion for new trial upon each and all of the grounds therein contained.

137.

Because the three-judge Court erred in the following rulings (which said rulings were made and entered by the District Court on June 7, 1941):

1. The Court erred in admitting over the objections and exceptions of defendant, and in refusing to strike on the motion of defendant, and in refusing to limit on the motion of defendant, each of the following items of evi- [fol. 340] dence:

(a) Tesimony of McCormack to the effect that in St. Louis he had a conversation with defendant O'Malley wherein O'Malley allegedly asked if the companies would be interested in settling the rate litigation, and suggested a meeting between Street and Pendergast, as hearsay and not binding on this defendant.

(b) Testimony of McCormack to the effect that he advised Street of the St. Louis conversation and Street agreed to talk to Pendergast, as hearsay and not binding on this defendant.

(c) Testimony of McCormack that O'Malley advised him that Pendergast would be in Chicago on a given date and he so advised Street.

(d) Testimony of McCormack that he notifed Street of Pendergast's visit in Chicago, that Street asked him if he would take money to Pendergast, that he conversed

with O'Malley in St. Louis and that O'Malley asked him for his share, claimed conversations between McCormack and O'Malley about $22,500.00 and $40,000.00, and $10,000.00 to be delivered at Menorah hospital, that O'Malley asked him to leave his name out before the Grand Jury, as hearsay and not binding on this defendant, this assignment being directed to each of said conversations.

2. The Court erred in overruling defendant's objection to judicial noticing of proceedings in the rate controversy and to the taking of such notice.

3. The court erred in directing the Clerk to alter the numbering and designation of this cause.

[fol. 341] 138.

Because the three-judge Court erred in its opinion and in the conclusion thereof in finding this defendant guilty, and in its judgment entered herein for each and all of the reasons hereinabove stated, which said reasons are here reassigned with the same force and effect as if again set out herein.

The defendant being aggrieved at the judgment of conviction and sentence of the three-judge Court, and desiring to appeal, and being in doubt whether the appeal lay to this Court or the Circuit Court of Appeals, did on June 7, 1941 take an appeal to the United States Circuit Court of Appeals for the Eighth Circuit, which appeal was allowed. Defendant does not, by taking this appeal, abandon the appeal heretofore taken to the United States Circuit Court of Appeals for the Eighth Circuit, or any of his rights in the premises, including his right to have the judgment of conviction and sentence reviewed either in the United States Circuit Court of Appeals for the Eighth Circuit or this Court.

WHEREFORE, by reason whereof and on account of the grounds of appeal above assigned and cited, and of which complaint is herein made, defendant Thomas J. Pendergast prays that the judgment and sentence of the court

entered against said defendant herein be reversed, set aside and for naught held.

R. R. Brewster
John G. Madden
James E. Burke
Attorneys for Defendant
Thomas J. Pendergast.

Filed in the United States District Court June 12, 1941

[fol. 342] (Notice of Appeal to Supreme Court of United States by Defendant, Robert Emmett O'Malley.)

In the District Court of the United States of America for the Central Division of the Western District of Missouri. United States of America, Plaintiff, vs. Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack, Defendants. No. 5,040. a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

Before KIMBROUGH STONE, Circuit Judge, ALBERT L. REEVES and MERRILL E. OTIS, District Judges.

Name and address of appellant: Robert Emmett O'Malley, 712 West 48th Street, Kansas City, Jackson County, Missouri.

Name and address of appellant's attorneys: James P. Aylward, George V. Aylward, Terence M. O'Brien, Ralph M. Russell, 1215 Commerce Building, Kansas City, Missouri.

Offense: Contempt of Court.

Date of judgment: June 7, 1941.

Brief description of judgment or sentence: Defendant found guilty of contempt. Sentenced to two years in United States institution of penitentiary type.

Name of prison where now confined, if not on bail: Defendant is now on bail.

I, the above named appellant, hereby appeal to the Supreme Court of the United States from the judgment above mentioned on the grounds set forth below.

Robert Emmet O'Malley
Appellant

Dated June 11th, 1941.

Service acknowledged above date

Richard K. Phelps, Asst. U. S. Atty and amicus curiae
By Charles F. Lamkin, Jr., Asst. U. S. Atty

[fol. 343] Grounds of Appeal:

1. Because the three-judge court erred in failing to hold that under the pleadings, the law and the evidence, this defendant was not shown to be guilty of the offense sought to be charged in this proceeding.

2. Because under the pleadings, the law and the evidence, this defendant is entitled to judgment and the three-judge court erred in failing to render judgment on behalf of this defendant.

3. Because the three-judge court erred in failing to find the defendant not guilty of contempt of court under the pleadings, the law and the evidence.

4. Because the three-judge court erred in not finding under the pleadin s, the law and the evidence, that this defendant was not shown to be guilty of contempt which this three-judge court had power or authority to punish.

5. Because the three-judge court was without jurisdiction to entertain, hear or determine this proceeding and erred in not so holding.

6. Because the three-judge court erred in assuming jurisdiction to entertain, hear or determine this proceeding in contempt, or to try to convict this defendant of the defense sought to be charged.

7. Because the three-judge court erred in assuming jurisdiction to punish this defendant for the alleged contempt sought to be charged.

8. Because the three-judge court was illegally convened at the inception of the insurance rate litigation mentioned in evidence (American Insurance Co. vs. Joseph B. Thompson, Superintendent of Missouri, et al., No. 270 in Equity, and companion cases bearing Docket Nos. 271 to 426, incl.) and did not lawfully acquire jurisdiction therein.

[fol. 344] 9. Because the three-judge court was without jurisdiction to entertain, consider, approve or disapprove the purported settlement or stipulation of settlement of the insurance rate litigation mentioned in evidence, and

erred in assuming, undertaking or entertaining such jurisdiction.

10. Because the three-judge court was without jurisdiction to disburse or supervise the disbursement of impounded funds mentioned in evidence.

11. Because the purported settlement of the insurance rate litigation mentioned in evidence was a nullity and not susceptible of approval or enforcement by the three-judge court, and the three-judge court erred in holding that said matter was within its jurisdiction.

12. Because, if the three-judge court acquired jurisdiction of the insurance rate litigation mentioned in evidence (which this defendant denies) under the colorable averments of the bills filed, such jurisdiction was lost prior to the proceedings in said litigation relating to the purported settlement thereof; and that said three-judge court thereafter had no power or authority under the law to act therein.

13. Because, prior to the proceeding in the insurance rate litigation relating to the purported settlement thereof, the three-judge court and the litigants in said insurance rate litigation recognized the constitutionality of the State statutes assailed in the bills in equity therein, and were proceeding solely upon the theory that the action of the Superintendent of Insurance of the State Of Missouri under constitutional statutes was confiscatory; as a result, any jurisdiction it may have theretofore acquired was thereupon lost and the three-judge court erred in proceeding thereafter, and was acting contrary to the terms and provisions of the Statutes of the United States authorizing the calling of a three-judge court.

[fol. 345] 14. Because the three-judge court under the statutes in such cases made and provided, could have acquired no jurisdiction in the insurance rate litigation mentioned in evidence other than to grant or deny injunctive relief sought on the ground of the unconstitutionality of a State statute or State statutes; and that in purportion to entertain, hear, consider, approve and enforce the purported settlement of said insurance rate litigation, in whole or in part, the three-judge court was acting extrajudicially and its action was a nullity and void; and the three-judge court erred in continuing to assert jurisdiction thereafter.

15. Because the bills in equity filed by the insurance companies in the insurance rate litigation mentioned in evidence failed to state a cause of action, were not petitions or bills to review the action of the Superintendent of Insurance complained of, did not justify or authorize injunctive relief by the three-judge court, were insufficient to authorize the creation or formation of a three-judge court, and said three-judge court sought to be convened, acquired no lawful jurisdiction and said three-judge court erred in asserting jurisdiction on [prodeeding] in said causes.

16. Because the three-judge court erred in charging this defendant with notice of the terms of the purported settlement, or that said purported settlement would be reduced to a written agreement and presented to the three-judge court for its approval, or that said three-judge court would act thereon, when such settlement was a nullity and when said three-judge court was without jurisdiction or authority to act thereon.

17. Because the three-judge court erred in asserting jurisdiction to direct the disbursement of the impounded funds mentioned in evidence in accordance with the purported settlement of said insurance rate litigation, or in taking any action thereon.

[fol. 346] 18. Because the three-judge court at the time of the alleged contempt charge herein was not a lawfully constituted court or exercising any lawful or constitutional or statutory jurisdiction, and its proceedings were erroneous and extrajudicial.

19. Because at the time of the institution of this proceeding, the three-judge court was not a lawfully constituted court or exercising any lawful or constitutional jurisdiction, and the three-judge court erred in attempting to assert jurisdiction herein.

20. Because the three-judge court, convened as a court of limited statutory jurisdiction, was without authority or jurisdiction to entertain, hear or determine this proceeding.

21. Because this proceeding was and is an independent action at law and not a part of the original proceeding in equity over which the three-judge court was attempting to assert jurisdiction; and said three-judge court therefore was without jurisdiction herein.

22. Because this proceeding is a prosecution for alleged criminal contempt and the three-judge court is vested with no jurisdiction thereover.

23. Because this proceeding was neither instituted nor maintained for the benefit of any litigant in the insurance rate litigation mentioned in evidence, or to coerce or compel obedience to any order, ruling, decree, or other purported exercise of jurisdiction by the three-judge court in said litigation, but solely to punish for past acts allegedly [contmeptuous] of said three-judge court, and said three-judge court, vested at most with jurisdiction (which defendant denies) for limited purposes in said original proceeding in equity, was without jurisdiction, power or authority so to punish.

24. Because, if this proceeding could lawfully be maintained (which this defendant denies), jurisdiction therein was vested in the District Court for the Central Division of the Western District of Missouri, presided over by Honorable John C. Collet, District Judge, and not in the [fol. 347] three-judge court which purported to exercise jurisdiction in this cause.

25. Because the information filed herein fails to state a cause of action against this defendant.

26. Because the information filed in this proceeding shows upon its face that it is barred by the statute of limitations and that the alleged contemptuous acts asserted therein occurred more than three years next before the institution of said proceeding.

27. Because the information shows that the alleged contemptuous acts sought to be charged against this defendant could not and did not constitute (a) contempt of court, (b) contempt of said three-judge court, (c) contempt of said three-judge court which said three-judge court had power, jurisdiction or authority to punish, or (d) contempt of said three-judge court, which said three-judge court had power or jurisdiction or authority to punish by summary process or by any procedure other than indictment.

28. Because the information shows upon its face that the three-judge court was without jurisdiction in this action.

29. Because the maintenance of this prosecution subjected this defendant to double jeopardy in violation of

the Fifth Amendment to the Constitution of the United States, in that this defendant had heretofore been prosecuted for the alleged offense or offenses sought to be charged in this proceeding under the indictments mentioned in evidence (United States vs. Thomas J. Pendergast, R. E. O'Malley and A. L. McCormack, No. 14912 and 14932, in the District Court of the United States for the Western Division of the Western District of Missouri), which said indictments were duly consolidated for trial and a jury duly impaneled and sworn and the United States thereafter dismissed said indictments and this defendant was acquitted and discharged thereunder, thereby having been acquitted of the offense or offenses charged [fol. 348] in this proceeding; and the three-judge court erred in failing to so hold.

30. Because this defendant has been prosecuted by the United States for the alleged offense or offenses sought to be charged in this proceeding under the indictments mentioned in evidence, which said indictments were consolidated for trial and a jury duly impaneled and sworn, and the United States thereafter dismissed said indictments and this defendant was acquitted and discharged thereunder, thereby having been acquitted of the offense or offenses sought to be charged in the information herein.

31. Because under the evidence it appears that this prosecution was barred by the statute of limitations and that said prosecution was not instituted or the information filed within three years next after the occurrence of the alleged contemptuous acts, and the three-judge court erred in failing to so find.

32. Because the evidence on the trial before the three-judge court failed to show (a) that defendant was guilty of the offense charged or sought to be charged; (b) that the defendant was guilty of contempt of court; (c) that the defendant was guilty of contempt of said three-judge court; (d) that defendant was guilty of contempt of said three-judge court, which said three-judge court had power or authority to punish; (e) that defendant was guilty of contempt of said three-judge court, which said three-judge court had power or authority to punish by summary process or by information or by procedure other than indictment; and the said three-judge court erred in failing so to find.

33. Because the acts charged against defendant and shown by the evidence did not constitute (a) contempt, (b) contempt of the three-judge court, (c) contempt of the three-judge court, which said three-judge court had power or authority to punish, (d) contempt of said three-[fol. 349] judge court, which said three-judge court had power or authority to punish in this proceeding or otherwise than by indictment.

34. Because the evidence failed to show that this defendant was guilty of any act in law contemptuous of the three-judge court; and said three-judge court erred in failing to find the defendant not guilty.

35. Because this defendant could not properly be charged with the act or acts of others in allegedly inducing action on the part of the three-judge court, or expressly or by implication perpetrating a fraud upon said three-judge court when there was no evidence that this defendant was a party thereto or knew or anticipated that any action would or was to be thus induced or any fraud so perpetrated; and no conspiracy was charged in the information or shown by the evidence; and the three-judge court erred in charging this defendant with any act or acts of others in said particulars.

36. Because the evidence failed to show this defendant guilty beyond a reasonable doubt; and the three-judge court erred in its finding of guilt.

37. Because the character of the Government's proof was such as to be insufficient to warrant a finding of guilt beyond reasonable doubt; and the three-judge court erred in so finding.

38. Because this prosecution was barred by reason of the agreement not to prosecute shown in the evidence, which said agreement was made between this defendant and the United States whereby and whereunder this defendant entered a plea of guilty mentioned in evidence in the income tax case mentioned in evidence, and served the sentence thereupon imposed, and the three-judge court erred in failing to find that said prosecution was barred by reason of said agreement, and in purporting to find that said prosecution was not barred by reason of said agreement.

[fol. 350] 39. Because the members of the three-judge court who purported to act in this cause were in fact disqualified in said proceeding, and in acting therein de-

prived this defendant of liberty and property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

40. Because there was no evidence that this defendant was a party to the actual settlement agreed upon in the insurance rate case or to any act or acts of others in connection with such settlement, or in the approval thereof; and the three-judge court erred in making each finding made in connection therewith.

41. Because there was no evidence in this cause that this defendant participated in any act or acts contemptuous of the three-judge court, or was chargeable with any intent or design so to do.

42. Because there was no evidence that this defendant was a party directly or indirectly to the compromise or settlement of the insurance rate litigation actually executed; and the three-judge court erred in its findings in connection therewith.

43. Because there was no evidence that this defendant was a party directly or indirectly to the stipulation of settlement mentioned in evidence; and said three-judge court erred in its finding with reference thereto.

44. Because there was no evidence that this defendant was a party directly or indirectly to any presentation of the stipulation of settlement mentioned in evidence, to the three-judge court for its approval (if there was evidence that such a settlement was presented for approval, which defendant denies), or to the motion for decree mentioned in evidence, or to any action taken to obtain the approval of said three-judge court to said stipulation, or to induce any action on the part of said three-judge court with reference thereto; if there is evidence of any such action, which defendant denies; and the three-judge court erred in its finding in connection therewith.

[fol. 351] 45. Because there was no evidence that there was any agreement between the defendants herein and Charles R. Street or between this defendant or any of the other defendants to the effect that they or any of them would keep the alleged transactions between them unknown to, or concealed from the said three-judge court, or that by affirmative acts of concealment or silence they or any of them would prevent said three-judge court from obtaining knowledge or information with reference there-

to; and the evidence of the Government in the trial of said cause was affirmatively to the contrary; and that by reason thereof the Government cannot rely upon any inference or presumption with reference to any such alleged agreement; and the Government is entitled to no such inference or presumption for the further reason that the evidence was undisputed that this defendant was not a party to any such agreement of any kind or character; and by reason of the facts aforesaid, the three-judge court erred in making its findings that there was such agreement, its finding of guilt and in making each all of its findings in connection with such alleged agreements.

46. Because there was no evidence that any concealment by A. L. McCormack before the United States Grand Jury of any facts relating to the settlement of the insurance rate litigation mentioned in evidence, if there was evidence of any such concealment, which defendant denies, was in furtherance of, or pursuant to any agreement whatsoever, and particularly to any agreement to which this defendant was ever a party; and the evidence of the Government affirmatively disproved any such contention; and that by reason thereof, the three-judge court erred in failing to find the defendant not guilty, and in failing to find that this action was barred by the statute of limitations; and further erred in making each and every finding which was made by said three-judge court in connection with said alleged Grand Jury testimony.

[fol. 352] 47. Because there was no evidence that any alleged communication between the defendant R. E. O'Malley and defendant A. L. McCormack during the course of the grand jury inquiry mentioned in evidence was at the instance or request of this defendant, or pursuant to, or in furtherance of any agreement to which this defendant was a party; and the three-judge court erred in making its finding of guilt and in failing to hold that this action was barred by the statute of limitations; and further erred in the making of each finding made in connection with said alleged communication or communications.

48. Because there was not sufficient evidence to warrant a finding of guilt against this defendant; and the three-judge court erred in making such finding.

49. Because there was no evidence sufficient to establish the offense charged or sought to be charged; and

the three-judge court erred in connection with each and every finding made in connection therewith.

50. Because there was no evidence sufficient to establish that this defendant was a party to any act contemptuous of the three-judge court; and the three-judge court erred in making its finding of guilt.

51. Because the evidence of the Government, binding upon the Government, affirmatively established the non-participation of this defendant in any act allegedly contemptuous of the three-judge court; and the three-judge court erred in failing to so find.

52. Because there was no evidence sufficient to establish the necessary elements and ingredients of the offense sought to be charged; and the three-judge court erred in making its finding of guilt.

53. Because there was no evidence sufficient to establish any offense on the part of this defendant committed within the jurisdiction of the three-judge court; and the three-judge court erred in making its finding of guilt for said reason.

[fol. 353] 54. Because there was no evidence sufficient to establish criminal intent on the part of this defendant; and the three-judge court erred in failing so to find.

55. Because there was no evidence sufficient to establish contemptuous intent upon the part of this defendant; and the three-judge court erred in its finding of guilt.

56. Because there was no evidence sufficient to establish that this defendant was guilty of [misbehaivor] in the presence of the three-judge court, or so near thereto as to obstruct the administration of justice; and the three-judge court erred in finding this defendant guilty.

57. Because the three-judge court erred in overruling and denying and failing to sustain the motion of this defendant to abate and quash the information filed in said three-judge court, and to withdraw the rule to show cause for each and all of the reasons therein appearing.

58. Because the three-judge court erred in overruling and denying, and in failing to sustain the motion of this defendant at the close of the evidence of the United States to declare this defendant not guilty and to dismiss this

proceeding, for each and all of the reasons therein appearing, and for each and all of the grounds therein stated.

59. Because the three-judge court erred in overruling and denying, and failing and refusing to sustain the motion of this defendant at the close of all the evidence to declare this defendant not guilty, and to dismiss this proceeding, for each and all of the reasons contained in said motion.

60. Because the three-judge court erred in admitting and receiving, over the objection and exception of this defendant, incompetent, irrelevant and immaterial evidence.

[fol. 354] 61. Because the three-judge court erred in excluding, over the exceptions of this defendant, competent, material and relevant evidence duly offered by this defendant.

62. Because the three-judge court erred in overruling and failing and refusing to sustain motions to strike incompetent, irrelevant and immaterial evidence, which said motions were duly made by this defendant.

63. Because the three-judge court erred in overruling, and in failing and refusing to sustain motions duly made by this defendant to limit and restrict the effect of purported evidence.

64. Because the findings, opinions and judgment of the three-judge court are against the law and the evidence.

65. Because the findings, opinions and judgment of the three-judge court, and each part thereof, are unsupported by substantial evidence.

66. Because the findings, opinions and judgment of the three-judge court are against the greater weight of the evidence.

[fol. 355] 67. Because the three-judge court erred in failing and refusing to declare this defendant not guilty for each of the reasons specified in the motion of this defendant filed at the close of all the evidence, to declare this defendant not guilty and to dismiss the proceedings.

68. Because the three-judge court erred in making and entering its first finding of fact (which said finding is

contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside the record of this cause, which said finding was made over the objection and exception of this defendant.

69. Because the three-judge court erred in making and entering its second finding of fact (which said finding of fact is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by any evidence and is predicated upon alleged matters and facts outside the record in this cause; and for the further reason that it contains broad and sweeping conclusions of law not predicated upon any evidence in the cause, which said finding was made over the objection and exception of this defendant.

70. Because the three-judge court erred in making and entering, over the objection and exception of this defendant, its third finding of fact (which said finding is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence and is predicated upon alleged matters and facts outside of the record in this cause; and for the further reason that it contains broad and sweeping conclusions of law not predicated upon any evidence in the cause.

[fol. 356] 71. Because the three-judge court erred in making and entering its third finding of fact for the reason that said finding of fact purports to find that this defendant and the other defendants entered into a conspiracy to present to the three-judge court in open court a purportedly fake settlement and to grossly deceive said three-judge court by the alleged lying, false and fraudulent representations allegedly made in open court at the instance of defendant, which said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, or any evidence, and is predicated upon alleged matters and facts outside the record in this cause, and contains broad and general conclusions of law not predicated upon any evidence in this cause, and was made over the objection and exception of this defendant.

72. Because the three-judge court erred in making and entering, over the objection and exception of this defendant, its fourth finding of fact (which said finding is contained in its opinion) for the reason that said finding is against the evidence, against the greater weight of the evidence, is unsupported by substantial evidence, and is predicated upon alleged matters and facts outside the record in this cause; and for the further reason that said finding contains broad and general conclusions of law not predicated upon any evidence in this cause.

73. Because the three-judge court erred in making, over the objection and exception of this defendant, each and every finding of fact made by said Court, whether made in said formal findings of fact or elsewhere in said opinions, or made in its judgment of conviction for the reason that each of said findings is contrary to the evidence, is contrary to the greater weight of the evidence, is unsupported by substantial evidence, is predicated upon alleged matters and facts outside the record in the cause; [fol. 357] and for the reason that each of said findings contains erroneous conclusions of law, not predicated upon any evidence in the cause.

74. Because the three-judge court erred in each and all of its conclusions of law.

75. Because the three-judge court erred in holding in its opinions that it possessed jurisdiction to entertain this proceeding in criminal contempt.

76. Because the three-judge court erred in its opinion, findings and judgments of conviction that it possessed jurisdiction to punish for the alleged criminal contempt sought to be charged in the information herein.

77. Because the three-judge court erred in holding in its findings, opinions and judgment that any acts of this defendant constituted contempt of said three-judge court.

78. Because the three-judge court erred in holding that any acts of this defendant shown by the evidence constituted contempt of said court, punishable by said court in this proceeding.

79. Because the three-judge court erred in its findings, opinions and judgment that this proceeding was incidental or anciliary to the so-called insurance rate litigation causes, and in failing to find that this proceeding

was an independent proceeding for prosecution for criminal contempt.

80. Because the three-judge court erred in holding that this proceeding entitled United States of America vs. Thomas J. Pendergast, et al., No. 5040, an action in criminal contempt, was incidental or ancillary to the so-called insurance rate litigation which was a proceeding in equity.

81. Because the three-judge court erred in failing and refusing to hold that a statutory three-judge court is without jurisdiction to entertain, hear or determine a prosecution for criminal contempt initiated on informa- [fol. 358] tion on the part of the United States against this defendant.

82. Because the three-judge court erred in its opinion in this cause in purporting to find in the first footnote to said opinion that this action was a proceeding incidental to American Insurance Co., et al., vs. [Thomspon], In Equity No. 270, when in fact this proceeding in contempt entitled United States of America, vs. Thomas J. Pendergast, et al., was a separate, independent criminal proceeding between the United States of America, plaintiff, and Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, defendants, and was numbered 5040, said number being a number assigned to this cause on the criminal docket of the Central Division of the District Court of the United States for the Western District of Missouri, presided over by the Honorable John C. Collet, District Judge.

83. Because the three-judge court erred in its opinion in holding that bribery was committed by this defendant or any of these defendants, or that political influence was brought to bear by the payment to this defendant of $440,000 for the reason that said purported finding and said statement is unsupported by any evidence in the record in this cause, and is contrary to the evidence.

84. Because the three-judge court erred in finding in its opinions that these defendants, allegedly conspirators, committed acts in open court in the presence and face of the Court grossly to deceive and hoodwink the Judges constituting the Court, said findings being unsupported by any evidence in the record in this cause, and contrary to the evidence; and if said finding was published in said opinions as a conclusion of law, said conclusion is er-

roneous and not predicated upon any evidence in the record.

85. Because the three-judge court erred in holding, finding and concluding in its opinions that this defendant or these defendants "prostituted the Court to their [fol. 359] venal purposes and exposed its Judges to the possibility of [disgrase] and to certain humiliation," said finding, holding and conclusion being unsupported by any evidence in the record of this cause and contrary to any evidence in the record of this cause.

86. Because the three-judge court erred in finding, holding and concluding that these defendants never denied that they were guilty of the alleged misbehavior, and in purporting to predicate a finding of guilt upon said alleged absence of a denial for the reason that said finding is not supported by the evidence, is contrary to the evidence and the pleadings in this cause, and ignores the issues.

87. Because the three-judge court erred in finding, holding and concluding in its opinion that this defendant and other defendants "stood on their technicalities", and erred in finding these defendants guilty of contempt of said three-judge court on said ground, said finding, holding and conclusion being in violation of this defendant's constitutional right guaranteed to him by Article V of the amendments to the Constitution of the United States, which in part, provides as follows:

> "No person shall be * * * compelled in any criminal case to be a witness against himself * * *",

in that the finding of guilt in said cause is based and predicated upon the failure of this defendant to testify in said cause.

88. Because the three-judge court erred in making a purported finding in a footnote to its opinion as follows:

> "The whole history of the criminal cases which resulted in the imposition of sentences on Pendergast and O'Malley for attempted evasion of income taxes, including much which throws light upon the background of the present proceeding in contempt, is set out in United States vs. Pendergast and O'Malley, 28 Fed. Supp. 601"

for the reason that said purported finding is not based upon any evidence in this cause, is outside the record, and

attempts to incorporated into this proceeding matters not [fol. 360] in issue.

89. Because the three-judge court erred in holding, finding and concluding in its opinion that this defendant confessed any alleged misbehavior or that this defendant had as well confessed any alleged misbehavior; said finding being unsupported by any evidence in the record, and contrary to any evidence in the record; and in basing its opinion of guilt upon said finding, the three-judge court thereby deprived defendant of his life and liberty without due process of law in violation of Article V of the amendments to the Constitution of the United States of America.

90. Because the three-judge court erred in erroneously construing the case of Nye and Mayers vs. United States of America, decided by the Supreme Court of the United States on April 10, 1941 and reported in ..... U.S. ....., 61 Sup. Ct. Rep. 810; 85 L. Ed. 733, 744 and in drawing unreasonable and unwarranted inferences therefrom and in holding that said decision was not applicable to this proceeding.

91. Because the three-judge court erred in finding, holding and concluding that this defendant and the other defendants "sent their messengers (their innocent and unsuspecting messengers) to the very courtroom and into open court", said finding being unsupported by any evidence in the record in this cause and contrary to the evidence in the record in this cause.

92. Because the three-judge court erred in finding, holding and concluding in its opinion that the alleged "misbehavior of these defendants was committed, where it took effect and where it was intended to take effect"; said finding, holding and conclusion being unsupported by any evidence in the record in this proceeding, and contrary to any evidence in the record in this proceeding.

95. Because the three-judge court erred in its opinion in failing and refusing to consider the contention of this defendant that a three-judge court had no jurisdiction, power or authority to entertain this proceeding in crimi- [fol. 361] nal contempt.

94. Because the three-judge court erred in finding, holding and concluding in its opinion that the alleged "whole transaction was for the express purpose of effecting a settlement of the insurance lititgation;" said find-

ing, holding and conclusion being unsupported by any evidence in the record in this cause and contrary to the evidence in the record in this cause.

95. Because the three-court judge erred in its deduction that the facts allegedly proved that there was a conspiracy between Street, O'Malley, McCormack and this defendant to obtain decrees disposing of the impounded fund, for the reason that said purported finding, conclusion and deduction is contrary to the pleadings, unsupported by the evidence, and contrary to the evidence.

96. Because the three-judge court erred in its opinion in this cause in holding that the prosecution herein was not barred by the statute of limitations, for each and all of the following reasons; (1) because it appears from the face of the information herein that said prosecution against this defendant is barred by the statute of limitations; (2) because under the evidence in the cause it appears that said prosecution is barred by the statute of limitations; (3) because each and all of the three-judge court's findings with reference to the statute of limitations are unsupported by the evidence and contrary to the undisputed evidence; (4) because it affirmatively appears from the evidence that the theory upon which the three-judge court held that the statute of limitations did not apply was erroneous in law and unsupported by the evidence.

97. Because the three-judge court erred in holding, finding and concluding that the alleged deception of this defendant and the other defendants continued the alleged misbehavior far beyond the actual entry of the decree in the insurance rate litigation, for the reason that said find-
[fol. 362] ing is unsupported by the evidence and is contrary to the undisputed evidence, and is erroneous in law.

98. Because the three-judge court erred in finding in its opinion that this defendant and the other defendants committed particular acts of "supplemental deception", said finding being unsupported by any evidence in the record in this cause and contrary to the evidence.

99. Because the three-judge court erred in its purported findings in its opinion to the effect that McCormack committed perjury before the Grand Jury, and that said alleged perjury was committed as a result of an agreement between the defendants and was an affirmative act of deception, for the reason that said purported finding

is unsupported by the evidence, is an erroneous conclusion, which is contrary to the evidence.

100. Because the three-judge court erred in finding and concluding that it could be reasonably inferred that this defendant and the other defendants had entered into an agreement with reeference to McCormack's testimony before said Grand Jury, for the reason that said purported inference is unwarranted by the evidence, is contrary to the evidence,and was affirmatively destroyed by the undisputed and uncontradicted evidence offered on behalf of the Government.

101. Because the three-judge court erred in its opinion in holding, concluding and finding that the alleged acts of the defendant were calculated to stir the Court's resentment and anger, and that the stirring of the Court's resentment and anger was the actual offense allegedly committed by this defendant and the other defendants, for the reason that said finding is erroneous in law, unsupported by the evidence, and contrary to the evidence.

102. Because the three-judge court erred in finding, holding and concluding that "There is no statute of limitations applicable to contempt committed 'in the presence [fol. 363] of the Court' ", for the reason that said statement is an erroneous conclusion of law, and for the further reason that it affirmatively appears from the evidence in this cause that there was no contempt committed in the presence of the Court.

103. Because the three-judge court erred in finding, holding and concluding in its opinion that the statute of limitations did not begin to run in this case until the alleged deception practiced by the defendants ceased to have effect, nor until the last alleged affirmative act fortifying the alleged deception was committed by the alleged conspirators or any of them, nor until the essence of the alleged contempt became an active principle by the alleged discovery of the truth, said conclusion being erroneous in law and unsupported by any evidence in the record, and being contrary to the evidence in the record.

104. Because the three-judge court erred in its opinion in holding that this defendant had not been subjected to double jeopardy by reason of the previous prosecution and acquittal of this defendant in Causes No. 14912 and 14932 in the District Court of the United States entitled United States of America, plaintiff, vs. Thomas J. Pender-

gast, R. E. O'Malley and A. L. McCormack, defendants, for the reason that said purported finding that the maintenance of this prosecution did not constitute double jeopardy is contrary to the undisputed evidence, and the conclusions of the Court in connection therewith are unsupported by the evidence, erroneous in law, and contrary to the record entries, verdicts and judgment in the causes hereinabove mentioned.

105. Because the three-judge court erred in its opinion in purporting to find that the agreement between the United States of America and this defendant, made and entered into prior to the entering of the plea of guilty in the income tax case mentioned in evidence, did not en- [fol. 364] title the defendant to a dismissal of this cause, for the reason that said finding is contrary to the terms and provisions of said agreement, contrary to the undisputed evidence in the cause, contrary to the judicial admissions made by the Government in the trial of this cause in open court, and contrary to the stipulations shown in the record in this cause.

106. Because the three-judge court erred in its opinion by finding, holding and concluding that the United States District Attorney only made known the agreement not to further prosecute this defendant at the instance and request of counsel for this defendant and the other defendants, and until after this defendant had been sentenced, and the term had passed, and after sentence could not be changed, and in purportedly finding that said United States District Attorney did not intend or contemplate that said agreement would extend to this proceeding in contempt, for the reason that said finding is contrary to the undisputed evidence in the cause and is unsupported by any evidence, and constitutes an unwarranted purported interpretation of the agreement shown by the evidence.

107. Because the three-judge court erred in finding, holding and concluding that this defendant and the other defendants "did everything conceivably possible to be done to avoid trial" under indictments returned in causes entitled United States of America, plaintiff, vs. Thomas J. Pendergast, R. E. O'Malley and A. L. McCormack, defendants, No. 14912 and 14932, in the District Court of the United States for the reason that said finding is unsupported by any evidence in the record, and contrary to the evidence.

108. Because the three-judge court erred in the following rulings upon the evidence (which said rulings were made and entered by the three-judge court on June 7, 1941):

In admitting over the objection and exception of this de-
[fol. 365] fendant, in failing and refusing to strike and refusing to limit as to this defendant testimony of A. L. McCormack contained in pages 38 to 78 of the transcript of the record in this cause.

109. The court erred in its formal judgment of conviction and sentence rendered on June 7, 1941, in adding to the title of cause No. 5,040 on the criminal docket of the Central Division of the Western District of Missouri, the notation that such cause was to be additionally entitled incidental to causes 270 to 426 in equity, when in fact, this cause could not be in any manner incidental to said causes in equity, and said finding and order is prejudicially erroneous.

110. Because the three-judge court erred in its opinion and in the conclusion thereof in finding this defendant guilty, and in its judgment entered herein for each and all of the reasons hereinabove stated, which said reasons are here reassigned with the same force and effect as if again set out herein.

111. The three-judge court erred in making purported findings of fact in its opinion, which said purported findings of fact were erroneous, misleading, and confusing and inconsistent with, and not supported by any evidence in the record in this cause, and containing conclusions of law not supported by the evidence; and not predicated upon the evidence, said findings of fact serving no lawful or proper procedural function in a prosectuion for criminal contempt.

112. The three-judge court erred in overruling defendant's motion for new trial and each separate assignment therein.

[fol. 366] The defendant, being aggrieved at the judgment of conviction and sentence of the three-judge court, and desiring to appeal, and being in doubt whether the appeal lay to this court of the Circuit Court of Appeals, did on June 7, 1941 take an appeal to the United States Circuit Court of Appeals for the Eighth Circuit, which appeal was allowed. Defendant does not, by taking this ap-

peal, abandon the appeal heretofore taken to the United States of Circuit Court of Appeals for the Eighth Circuit, or any of his rights in the premises, including his right to have the judgment of conviction and sentence reviewed either in the United States Circuit Court of Appeals for the Eighth Circuit or this court.

WHEREFORE, by reason whereof and on account of the grounds of appeal above assigned and cited, and of which complaint is herein made, defendant, Robert Emmett O'Malley, prays that the judgment and sentence of the court entered against defendant herein be reversed, set aside and for naught held.

James P. Aylward
George V. Aylward
Terence M. O'Brien
Ralph M. Russell
Attorneys for Robert Emmett O'Malley

Filed in the United States District Court June 12, 1941

[fol. 367] (Appellee's Jurisdictional Statement, and Motion to Dismiss Appeal to the Supreme Court of the United States.)

In the District Court of the United States for the Western District of Missouri, Central Division United States of America, Plaintiff (Appellee), vs. Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack, Defendants (Appellants). No. 5040 (A proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.)

Now comes the above named plaintiff United States of America (appellee) and respectfully states that the Supreme Court of the United States is without jurisdiction of the appeals to that court heretofore on June 12, 1941 taken by defendants Thomas J. Pendergast and Robert Emmett O'Malley by the filing of notices of appeal herein; and said appellee moves that the appeals so taken by said defendants to the Supreme Court of the United States, and each of said appeals, be dismissed, for the following reasons:

1. The Supreme Court of the United States has no jurisdiction of a direct appeal from the judgment of the District Court of the United States for the Western District of Missouri, Central Division, unless such appeal be [fol. 368] authorized by the provisions of the Act of Feb. 13, 1925, c. 229, sec. 1, 43 Stat. 938, 28 U. S. Code, sec. 345;* or by the provisions of the Act of Aug. 24, 1937, c. 754, sec. 2, 50 Stat. 752, 28 U. S. Code, sec. 349a (relating to certain suits involving the constitutionality of federal statutes); or by the provisions of the Act of Aug. 24, 1937, c. 754, sec. 3, 50 Stat. 752, 28 U. S. Code, sec. 380a (also relating to certain suits involving the constitutionality of federal statutes).

2. The appeals which defendants Pendergast and O'Malley have attempted to take to the Supreme Court of the United States, as aforesaid, obviously are not authorized by any provision of 28 U. S. Code, sections 349a or 380a (both of which sections relate to suits involving the constitutionality of federal statutes). Nor is such a "direct review" by the Supreme Court of the United States "provided" by any of the statutes mentioned in 28 U. S. Code, sec. 345. Said appeals obviously are not authorized by any provision of 15 U. S. Code, sec. 29 (relating to suits under the anti-trust laws), or by any provision of 49 U. S. Code, sec. 45 (relating to suits under the Interstate Commerce Act), or by any provision of 18 U. S. Code, [fol. 369] sec. 682 (relating to direct appeals by the United States in certain criminal cases), or by any provision of 28 U. S. Code, secs. 47 or 47a (relating to injunctions as to orders of the Interstate Commerce Commission), or by any provision of 7 U. S. Code, sec. 217 (relating to suits affecting orders of the Secretary of Agriculture).

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*Sec. 345. (Judicial Code, section 238, amended.) Appellate jurisdiction from decrees of United States district courts. A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections or parts of sections, and not otherwise:

(1) Section 29 of Title 15, and section 45 of Title 49.

(2) Section 682 of Title 18, where the decision of the district court is adverse to the United States.

(3) Section 380 of this title.

(4) So much of sections 47 and 47a of this title as relate to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money.

(5) Section 217 of Title 7. (Mar. 3, 1911, c. 231, Sec. 238, 36 Stat. 1157; Jan. 28, 1915, c. 22, Sec. 2, 38 Stat. 804; Feb. 13, 1925, c. 229, Sec. 1 43 Stat. 938.)

3. Said appeals are not authorized by any provision of 28 U. S. Code, sec. 380. The only direct appeal to the Supreme Court authorized by said section is (a) an appeal from an order of a three-judge court granting or denying an interlocutory injunction, or (b) an appeal from a final decree granting or denying a permanent injunction, in the type of case described in said section. The appeals which have been taken to the Supreme Court of the United States by appellants Pendergast and O'Malley are not appeals from an order granting or denying an interlocutory injunction; nor are they appeals from a final decree granting or denying a permanent injunction. Therefore said appeals do not fall within either category; and are not authorized by any provision of 28 U. S. Code, sec. 380. Since that is true the Supreme Court of the United States has no jurisdiction of said appeals, and said appeals should be dismissed by said court.

4. The Act of Feb. 13, 1925, c. 229, sec. 1, 43 Stat. 938, 28 U. S. Code sec. 345, does not provide for a "direct review" by the Supreme Court of every appeal which may be taken in any case mentioned in the five different statutes there listed; but, on the contrary, provides for such direct review by said court only "where it is so provided" in the sections themselves. For instance, a direct appeal to the Supreme Court may be had under 18 U. S. Code, sec. 682, only in the specific cases therein provided. (United States v. Borden & Co., 308 U. S. [fol. 370] 188, 193, and cases cited.)

5. The Circuit Court of Appeals for the Eighth Circuit is, by the provisions of the Act of Feb. 13, 1925, c. 229, sec. 1, 43 Stat. 936; as amended; 28 U. S. Code, sec. 225, given exclusive jurisdiction of all appeals from said District Court in all cases not falling within the provisions of the Act of Feb. 13, 1925, c. 229, sec. 1; 43 Stat. 938, 28 U. S. Code, sec. 345; and each of said defendants, Pendergast and O'Malley, did on June 7, 1941, accordingly appeal to said Circuit Court of Appeals from the judgment of said District Court adjudging them guilty of contempt of court. This fact appears upon the face of the notices of appeal filed by said defendants.

6. The aforesaid appeals to the Supreme Court of the United States and the aforesaid appeals to the Eighth Circuit Court of Appeals by said Thomas J. Pendergast and Robert Emmett O'Malley are appeals from a judgment rendered June 7, 1941, by a three-judge District

Court sitting in the District Court of the United States for the Western District of Missouri, Central Division, which judgment found said defendants guilty of contempt of said court, and sentenced each of them to imprisonment. Said three-judge court had previously been constituted in accordance with the provisions of the Act of Feb. 13, 1925, c. 229, sec. 1, 43 Stat. 938, 28 U. S. Code, sec. 380, in certain equity cases in said court numbered 270 to 426, inclusive. Said equity cases were instituted in said District Court by a large number of fire insurance companies, and in said cases said insurance companies sought injunction forbidding the defendant O'Malley as Superintendent of the Insurance Department of the State of Missouri from interfering with certain rates filed by said companies. The judgment finding said defendants guilty of contempt of court was rendered after a trial and hearing upon an information filed by the Acting United States District Attorney for the Western Dis- [fol. 371] trict of Missouri in a proceeding incidental to said suits. Said information stated the nature of said equity cases, and in substance charged the following facts: That on July 2, 1930, temporary injunctions were issued by said three-judge court in said equity cases; that a custodian was appointed to receive a certain excess of premiums, pending final decision of the cases; that a master was appointed to take and that he proceeded to take testimony in said cases; that on June 18, 1935, motions for decrees were filed in said cases, setting up that settlements had been arrived at in accordance with the stipulation also filed; that on February 1, 1936, said three-judge court entered its decree in accordance with the stipulation distributing approximately $8,000,000 in impounded funds as agreed to by the parties; that the stipulation of settlement and for distribution of funds and the consequent decree were induced corruptly and in contempt of said three-judge court; that defendant O'Malley had conferred with one A. L. McCormack asking him to confer with one Street, acting for the insurance companies, to get Street to confer with defendant Thomas J. Pendergast about a possible settlement of the insurance litigation, that accordingly Street did confer with Pendergast; that Street told Pendergast he would pay a fee to bring about a settlement; that a fee of $500,000 was agreed upon; that a first installment of $50,000 was paid; that a second installment of $50,000 was paid, of which $22,500 went to

McCormack and $22,500 went to appellant O'Malley, who was then Superintendent of the Insurance Department of the State of Missouri; that later $330,000 was given by Street to McCormack and by McCormack to Pendergast, Pendergast keeping $250,000 and dividing $80,000 between O'Malley, and McCormack; that a final payment of $10,000 was made by Street to McCormack and by McCormack [fol. 372] to Pendergast; that the payments were made to buy the influence of Pendergast, to corrupt O'Malley to accept the settlement and to obtain the decree by fraudulent means; that Pendergast, O'Malley and McCormack agreed that, by affirmative acts of concealment, they would prevent discovery by the court of the bribery and fraud which had been committed to obtain the decree, and that one or more of the three thereupon and thereafter perpetrated such affirmative acts of concealment, which were specifically described in the information. (See United States v. Pendergast, 35 Fed. Supp. 593.)

7. The nature of said contempt proceeding is further shown by the findings of fact contained in the opinion of said three-judge court (United States v. Pendergast, Fed. Supp. .) Said findings of fact are as follows:

"1. On May 28, 1930, one hundred and thirty-nine insurance companies filed one hundred and thirty-seven separate [injuction] suits against the Superintendent of Insurance and the Attorney General of Missouri to protect proposed increase of premium rates for fire, windstorm and hail insurance filed by the companies with the superintendent. Thereupon this three-judge court was constituted. Temporary [injuctions] thereafter were entered upon conditions, one of which was that the companies might collect the increased rates pendente lite but must deposit the amount of the increase so collected with a custodian of the court to await the ultimate outcome of the suits. Deposits were made aggregating $10,000,000.

"2. One Charles R. Street, now deceased, was the agent of the companies. Thomas J. Pendergast was a political 'Boss' with almost dictatorial power residing in Kansas City. R. Emmett O'Malley, a creature of Pendergast, was Superintendent of Insurance and a party-defendant in the suits. A. L. McCormack was an insurance agent residing in St. Louis.

"3. Before final determination of any of the suits Street, Pendergast, O'Malley and McCormack conspired and agreed together that the insurance companies (acting through Street) and O'Malley would enter into a pretended or fake settlement of the suits, whereby the interest of policyholders would be sacrificed and 80% of the impounded fund would be paid to the companies. It was a part of the conspiracy - and it was effected by Street, Pendergast, O'Malley and McCormack - that Street, as agent of the companies, would pay Pendergast for his influence with and control over O'Malley [fol. 373] the total sum of $750,000 ($440,000 actually was paid to Pendergast), with a portion of which O'Malley should be bribed to betray the policyholders ($62,500 was paid to O'Malley) and with another portion of which McCormack was to be compensated for his services as messenger between Street, Pendergast and O'Malley (McCormack was paid $62,500). It was a part of the conspiracy - and it was effected by Street, Pendergast, O'Malley and McCormack - that when the fake settlement of the suits finally was agreed on by Superintendent O'Malley and Street (the fake settlement was reached in the Muehlebach Hotel in Kansas City, about six blocks from the United States Court House where the suits were pending) the attorneys for the Superintendent and the companies (the attorneys being ignorant of the corruption and fraud) would present to the court, in open court, as a basis for motions for decrees, the fake settlement, as a genuine, good-faith settlement by antagonistic litigants. The fake settlement was presented to the court June 22, 1935, by Street, Pendergast, O'Malley and McCormack through and by their messengers. The court, the members of which were grossly deceived by the lying, false and fraudulent representation made in open court at the instance of Pendergast, O'Malley, Street and McCormack, entered the decrees February 1, 1936. The deception practiced on the court was vicious misbehavior, committed and consummated in the presence of the court and in open court. It was intended and calculated to mislead and deceive the court and to obtain fraudulent judgments and decrees. The deception was a continuing deception, was intended to exert its deceiving, pernicious and poisonous influence indefinitely, and until and unless discovered by the court. The decep-

tion was fortified and renewed by affirmative supplemental acts of deception committed as late as March, 1939.

"4. When the court discovered (early in 1939) - through investigations of government agents into suspected income tax evasions and consequent grand jury inquisitions (the matter also was formally called to the court's attention by motions filed May 29, 1939) - that it had been victimized and its decrees obtained by gross imposture and fraud perpetrated upon it, in open court and in the presence of the court, it requested the United States Attorney to file an information in contempt. The information in this case, filed at last on July 13, 1940, resulted."

8. Upon the facts so found said three-judge court by its conclusion of law declared the defendants Pendergast, O'Malley and McCormack guilty of contempt of said court as charged in the information; and said court on June 7, 1941, rendered its judgment in said contempt proceeding [fol. 374] as follows:

"JUDGMENT

"This proceeding in contempt coming on to be heard upon (a) the information filed by the United States Attorney at the direction of this court sitting in cases Nos. 270 to 426, inclusive, (b) the rule to show cause, and (c) the answers of the defendants thereto; and the court having (a) judicially noticed the proceedings, files and records in cases Nos. 270 to 426, inclusive, for the limited purpose of ascertaining in this incidental proceeding the character of those cases and their status and condition on and prior to February 1, 1936, and (b) having heard the evidence offered by the parties in this incidental contempt proceeding and the argument of counsel, and (c) being fully advised in the premises, and (d) having filed herein its opinion, including its Findings of Fact and its conclusion touching the guilt of defendants, Now, Therefore,

"IT IS ORDERED, ADJUDGED AND DECREED that -

"1. The defendants, Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, are guilty of contempt of this court; and that

"2. The defendant, Thomas J. Pendergast, be and he is hereby sentenced to the custody of the Attorney General of the United States for imprisonment in an institution of the penitentiary type for a period of two years; the defendant, Robert Emmett O'Malley, be and he is hereby sentenced to the custody of the Attorney General of the United States for imprisonment in an institution of the penitentiary type for a period of two years; the defendant, A. L. McCormack, be and he is hereby sentenced to be on probation for a period of two years; and that

"3. To conform with the fact, the clerk of this court shall add to the word and figures 'No. 5040' wherever they appear after the style of this incidental proceeding, the words - 'a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive;' and that

"4. The costs of this incidental proceeding are assessed against the defendants Thomas J. Pendergast and Robert Emmett O'Malley."

9. A dismissal of the aforesaid appeals by the Supreme Court will not deprive said defendants Pendergast and O'Malley of the right to have said judgment in contempt reviewed on appeal, inasmuch as said defendants have appealed from said judgment to the Eighth Circuit Court [fol. 375] of Appeals, which has exclusive jurisdiction thereof under the provisions of 28 U. S. Code, sec. 225.

10. The Supreme Court of the United States has held that it does not have jurisdiction of a direct appeal from a judgment in contempt rendered by a District Court. (Farmers & Mechanics National Bank v. Wilkinson, 266 U. S. 503, 506.)

11. This jurisdictional statement and motion is now filed by plaintiff (appellee) United States of America within fifteen days after service upon appellee of said notices of appeal; and is filed at this time in order to avoid any possible conflict with Supreme Court Rule No. 7, paragraph 3. However, it is but fair to say that opposing counsel have today advised us that they intend shortly to file petitions for appeal to the Supreme Court. If they should pursue this course, the appellee will renew its motion to dismiss said appeals, upon the same grounds hereinbefore stated in reference to the appeals taken by the notices of appeal filed on June 12, 1941.

WHEREFORE, the appellee United States of America moves that the appeals to the Supreme Court of the United States heretofore on June 12, 1941 taken by defendants Thomas J. Pendergast and Robert Emmett O'Malley, by the filing of notices of appeal, be dismissed.

Richard K. Phelps
William S. Hogsett
Counsel for Appellee

Due service of copies of the above and foregoing statement and motion is hereby acknowledged this 27th day of June, 1941.

Ralph M. Russell
Counsel for Appellant
Robert Emmett O'Malley

John G. Madden
Counsel for Appellant
Thomas J. Pendergast

Filed in the United States District Court June 27, 1941

[fol. 376] (Order Extending Time to File Transcript.)

Now, on this day, this cause coming on for hearing on the application of defendant-appellant, Thomas J. Pendergast, for an enlargement of time for docketing and filing a transcript of the record in the above entitled cause in the Circuit Court of Appeals for the Eighth Circuit; and

WHEREAS, on or about the 7th day of June, 1941, said defendant-appellant in the above entitled cause duly appealed from the judgment of this Court to the said Circuit Court of Appeals for the Eighth Circuit; and

WHEREAS, this Court duly issued its citation requiring plaintiff-appellee in the above cause to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit at the City of St. Louis, Missouri, forty (40) days from and after the date thereof, viz.: on or about July 17th, 1941; and

WHEREAS, under the rules and orders of the said Circuit Court of Appeals the time for the docketing of

said cause and the filing of the record therein with the Clerk of said Court has not yet expired; and

[fol. 377] WHEREAS, said defendant-appellant has applied for an enlargement of the time for the docketing of said cause and for the filing of the record therein with the said Clerk of the said Circuit Court of Appeals.

NOW, THEREFORE, being fully advised in the premises, IT IS, BY THE COURT, for good cause shown, ORDERED:

That the time for the docketing of such cause and the filing of the record therein with the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, and for the doing of any other act or thing incident to the perfection of said appeal, be, and the same hereby is, for all purposes, extended and enlarged to and including the 1st day of September, 1941.

Dated this 2nd day of July, 1941.

Kimbrough Stone
Circuit Judge.

Albert L. Reeves
District Judge.

Merrill E. Otis
District Judge.

Filed in the United States District Court July 2, 1941

[fol. 378]

[fol. 379]

[fol. 380] (Jurisdictional Statement on Behalf of Appellee and Motion to Dismiss Separate Appeals to Supreme Court of United States of Thomas J. Pendergast and Robert Emmett O'Malley.)

In the District Court of the United States for the Western District of Missouri, Central Division United States of America, Plaintiff (Appellee), vs. Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack, Defendants (Appellants). No. 5040. A proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

Now comes plaintiff (appellee) United States of America and respectfully states that the Supreme Court of the

United States is without jurisdiction of the separate appeals to that court, taken on July 2, 1941, by defendants (appellants) Thomas J. Pendergast and Robert Emmett O'Malley, by the filing of their respective notices of appeal, and by the filing of their respective petitions for appeal accompanied by their respective assignments of error; and said appellee moves that the separate appeals so taken by said defendants to the Supreme Court of the United States, and each of said appeals, be dismissed, for the following reasons:*

First. The nature and essential facts of the case are clearly stated in the opinions below, copies of which are [fol. 381] attached to the jurisdictional statements of defendants (appellants) Pendergast and O'Malley. The opinion on motions to abate and quash the information in contempt is reported at 35 F. Supp. 593, and the opinion filed after the hearing is reported at ____ F. Supp. ____.

Second. The three-judge district court was properly convened to hear and determine the insurance rate cases, and had jurisdiction to hear and determine the same and all issues therein, under the provisions of Sec. 266 of the Judicial Code as amended, Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938, 28 U. S. Code, Sec. 380, because: The plaintiff insurance companies in said cases each prayed for an interlocutory injunction, and for a permanent injunction, suspending and restraining the enforcement, operation and execution of statutes of Missouri, by restraining the action of the Superintendent of the Insurance Department and of the Attorney General of said state, in the enforcement and execution of said statutes, and in the enforcement and execution of an order (dated May 28, 1930, disapproving the filing by said insurance companies of increased rates) made by said Superintendent of the Insurance Department acting under and pursuant to said statutes, upon the ground of the unconstitutionality of said statutes. (See bill in equity, and the amended bill and supplemental bill, in one of said cases, entitled American Insurance Company v. Thompson et al., No. 270, which are substantially identical with like bills in the other cases. Said bills appear in the transcript.) The insurance companies pressed their ap-

*The jurisdictional statements filed by said appellants are identical; therefore appellee files one jurisdictional statement and motion to dismiss, applicable to the appeals of both appellants.

plications for interlocutory injunction, and the same were presented to and granted by said three-judge court. The following decisions by the Supreme Court sustain the jurisdiction of said three-judge court in the insurance rate cases:

[fol. 382] National Fire Ins. Co. v. Thompson, Supt. of the Insurance Dept. of the State of Missouri, 281 U.S. 331, 333.

Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290, 292.

Herkness v. Irion, 278 U. S. 92, 93-4.

United Fuel Gas Co. v. Public Service Commission, 278 U. S. 322, 323.

Tyson & Brother v. Banton, District Attorney, 273 U. S. 418, 428.

Board of Public Utility Commissioners, v. New York Telephone Co., 271 U. S. 23, 26.

Lawrence v. St. Louis-San Francisco Railway Co., 274 U. S. 588, 590.

Banton v. Belt Line Railway Corp., 268 U. S. 413, 415.

Gilchrist v. Interborough Rapid Transit Co., 279 U.S. 159, 189-190.

Williams v. Standard Oil Co., 278 U. S. 235, 238-9.

The Superintendent of the Insurance Department of the State of Missouri is "an administrative board or commission" within the meaning of 28 U. S. Code Sec. 380.

Moore, Insurance Commissioner v, Fidelity & Deposit Co., 272 U. S. 317, 320.

National Fire Insurance Co. v. Thompson, Supt. of the Insurance Dept. of the State of Missouri, 281 U. S. 331, 333.

Cline, District Attorney, v. Frink Dairy Co., 274 U.S. 445, 449, 451.

Tyson & Brother v. Banton, District Attorney, 273 U.S. 418, 428.

Banton v. Belt Line Railway Corp., 268 U.S. 413, 415.

Third. The three-judge court, having jurisdiction of the insurance rate cases, had inherent power to punish for contempt arising out of and incidental to those cases.

Michaelson et al. v. United States, 266 U.S. 42, 65-66.

Myers et al. v. United States, 264 U.S. 95, 103.

United States v. Hudson and Goodman, 11 U. S. 32, 7 Cranch 32, 34.

The contempt consisted of carrying out a conspiracy between one Charles R. Street (agent for the plaintiff insurance companies, now deceased), defendant McCormack (who acted as go-between), defendant Pendergast (a political boss) and defendant O'Malley (defendant Superintendent of the Insurance Department) by corrupt means, including bribery of O'Malley, to obtain a decree of the three-judge court approving a so-called "settlement" of [fol. 383] the insurance rate cases, and authorizing distribution of about $10,000,000 in impounded premiums. The so-called "settlement" provided that 20 per cent, or approximately $2,000,000, would go to the policyholders and 80 per cent, or approximately $8,000,000, would go to the insurance companies. According to the secret agreement of the conspirators, Pendergast's "fee", contingent on bringing this "settlement" about, was to be $500,000 - later increased to $750,000; and of this sum he was paid $440,000 by the insurance companies, out of which he paid the $62,500 bribe to Superintendent O'Malley, and $62,500 to the intermediary McCormack. A decree authorizing distribution of the impounded premiums was obtained from the three-judge court, by the filing in open court of a stipulation of the parties and motion for decree alleging the "settlement," and upon assurances by the parties (through counsel) in open court that the "settlement" had been made in good faith as the result of negotiations at arm's length, and was for the best interest of the policyholders. The bribery and corruption were of course concealed from the court. The decree was thus corruptly obtained by acts and representations in open court. In accordance with the decree the court's custodian, from time to time during the ensuing three years, continued distribution of the impounded premiums. In the spring of 1939 the bribery and corruption came to light, through investigation activities by the Income Tax Division of the Treasury Department of the United States. The three-judge court learned of it, and this contempt proceeding followed. (The subsequent history of the insurance rate litigation appears in American Insurance Co. v. Lucas, 38 F. Supp. 896, and see opinion on insurance companies' motion for new trial at 926.) During the three-year interval, while the conspiracy was unknown, and as late as [fol. 384] March, 1939, two of the conspirators, in accordance with the agreement of all, perpetrated affirmative acts of concealment to keep the bribery and corruption hidden from the three-judge court. Under these facts,

the defendants' contempt of court clearly grew out of and was incidental to the insurance rate cases, and the three-judge court, against which the contempt was committed, had exclusive jurisdiction to punish it.

In re Debs, 158 U. S. 564, 594-5.
Myers v. United States, 264 U. S. 95, 104.
Michaelson v. United States, 266 U. S. 42, 65-6.
Merchants' Stock & Grain Co. v. Board of Trade, (8 C. C. A.), 201 Fed. 20, 27.
Sullivan v. United States, (8 C. C. A.), 4 F. 2d 100, 101.
Dunham v. United States, (5 C. C. A.), 289 Fed. 376, 378.

Fourth. The appeals from the contempt judgment by Pendergast and O'Malley to the Supreme Court of the United States, by the filing of notices of appeal, on July 2, 1941, should be dismissed, because: If such direct appeals were permitted by law at all (which appellee denies, for reasons hereinafter stated), they could only be taken by petitions for appeal accompanied by assignments of error. (Supreme Court Rule 9; and compare Rule 72 of the Rules of Civil Procedure.) The purported appeals by notices filed July 2, 1941, do not comply or even purport to comply with any of the requirements of a notice of appeal in criminal cases. (Rule III of the Rules of Practice and Procedure in Criminal Cases Promulgated by the Supreme Court of the United States, May 7, 1934.)

Fifth. None of said appeals taken by said defendants Pendergast and O'Malley on July 2, 1941, whether by filing notices of appeal or by filing petitions for appeal accompanied by assignments of error, is authorized by any provision of Sec. 266 of the Judicial Code as amended. Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938, 28 U. S. Code Sec. 380, which is the statute upon which said [fol. 385] defendants, in their respective jurisdictional statements, rely to sustain the jurisdiction of the Supreme Court of the United States. The only direct appeal to the Supreme Court authorized by said section is (a) an appeal from an order of a three-judge court granting or denying an interlocutory injunction, or (b) an appeal from a final decree granting or denying a permanent injunction, in the type of case described in said section. The appeals which have been taken to the Supreme Court by defendants Pendergast and O'Malley are not appeals

from an order granting or denying an interlocutory injunction; nor are they appeals from a final decree granting or denying a permanent injunction. Therefore said appeals do not fall within either category; and are not authorized by any provision of said section.

Sixth. Section 238 of the Judicial Code as amended, Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938, 28 U.S. Code Sec. 345, upon which said defendants in their respective jurisdictional statements also rely, does not authorize said appeals to the Supreme Court, because: Said appeals obviously are not authorized by any provision of 15 U. S. Code Sec. 29 (relating to suits under the Anti-Trust Laws), or by any provision of 49 U. S. Code Sec. 45 (relating to suits under the Interstate Commerce Act), or by any provision of 18 U. S. Code Sec. 682 (relating to direct appeals by the United States in certain criminal cases), or by any provision of 28 U. S. Code Secs. 47 or 47a (relating to injunctions affecting orders of the Interstate Commerce Commission), or by any provision of 7 U.S. Code Sec. 217 (relating to suits affecting orders of the Secretary of Agriculture); and, as shown in the preceding paragraph, said appeals are not authorized by any provision of 28 U. S. Code Sec. 380. Section 238 of the Judicial Code as amended, Act of February 13, 1925, c. [fol. 386] 229, Sec. 1, 43 Stat. 938, 28 U.S. Code 345, does not provide for a "direct review" by the Supreme Court of every appeal which may be taken in any case mentioned in the five different statutes or parts of statutes there listed; but, on the contrary, provides for such direct review by the Supreme Court only "where it is so provided" in the sections themselves. For example, a direct appeal to the Supreme Court may be had under 18 U.S. Code Sec. 682 only in the specific cases therein provided. (United States v. Borden & Co., 308 U.S. 188, 193, and cases cited.)

Seventh. Defendants Pendergast and O'Malley have taken timely appeals from the judgments in question to the Eighth Circuit Court of Appeals, as shown by their respective jurisdictional statements. By the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 936, as amended, 28 U.S. Code Sec. 225 (Section 128 of Judicial Code as amended) the Circuit Court of Appeals is given exclusive jurisdiction of all appeals from the District Court in all cases not falling within the provisions of Section 238 of the Judicial Code as amended, Act of February 13, 1925,

c. 229, Sec. 1, 43 Stat. 938, 28 U. S. Code Sec. 345. Therefore the situation presented here is radically different from that presented in Rorick v. Board of Commissioners of Everglades Drainage District, 307 U.S. 208, 213; Oklahoma Gas & Electric Co. v. Oklahoma Packing Co., 292 U.S. 386, 392; Gully v. Interstate Natural Gas Co., 292 U.S. 16, 19; Phillips v. United States, 312 U. S. 246, 85 Law Ed. 460, 465; and International Ladies' Garment Workers' Union v. Donnelly Garment Co., 304 U.S. 243, 252, cited in appellants' jurisdictional statements. In each of those cases the time for appeal to the Circuit Court of Appeals had expires. A dismissal by the Supreme Court of the appeals taken to that court by Pendergast and O'Malley will not deprive them of the right to have the judgment in question reviewed on appeal; and, [fol. 387] to the contrary, they may have the judgment reviewed by the Eighth Circuit Court of Appeals, which has exclusive jurisdiction thereof. A timely appeal having been taken to that court, the judgment can be reviewed there, although it was rendered by three judges.

Phillips v. United States, 312 U.S. 246, 254, 85 Law Ed. 460, 465.

Healy v. Ratta, 289 U.S. 701.

Healy v. Ratta, 292 U.S. 263, 264.

Eighth. The Supreme Court of the United States has held that it does not have jurisdiction of a direct appeal from a judgment in contempt rendered by a District Court. (Farmers' & Mechanics' National Bank v. Wilkinson, 266 U.S. 503, 506.)

Ninth. None of the cases cited in appellants' jurisdictional statements sustains jurisdiction in the Supreme Court of the United States of the appeals herein.

In Rorick v. Board of Commissioners of Everglades Drainage District, 307 U.S. 208, 213; Oklahoma Gas & Electric Co. v. Oklahoma Packing Co., 292 U.S. 386, 392; Gully v. Interstate Natural Gas Co., 292 U.S. 16, 19; and Phillips v. United States, 312 U.S. 246, 254, 85 Law Ed. 460, 465, the Supreme Court held it had no jurisdiction of the direct appeals there involved. But in each of those cases the time for appeal to the Circuit Court of Appeals had expired, and for that reason alone, and in order to save the appellants' right to review, the court vacated the decree below and remanded the cause for further pro-

ceedings independently of Section 266 of the Judicial Code (28 U.S. Code Sec. 380). In International Ladies' Garment Workers' Union v. Donnelly Garment Co., 304 U.S. 243, 252, the decision was to the same effect, except there the jurisdictional statute involved was Section 3 of the Act of August 24, 1937. Obviously these cases are without influence here, because Pendergast and O'Malley [fol. 388] have not lost their right of review, and have in fact appealed to the Eighth Circuit Court of Appeals.

In Moore v. Fidelity & Deposit Co., 272 U. S. 317, 321, and Smith v. Wilson, 273 U. S. 388, 391, the Supreme Court dismissed direct appeals from the District Courts, because in each case the application for preliminary injunction was not pressed - and in the Moore case there was no request for a three-judge court. Clearly those cases are without influence here.

In United States v. California Cooperative Canneries, 279 U. S. 553, 560, and Terminal Railroad Ass'n v. United States, 266 U. S. 17, 32, the Supreme Court held that the direct appeals were authorized under the Expediting Act of February 11, 1903, c. 544, 32 Stat. 823. Plainly those cases are not in point.

In Arkadelphia Milling Co. v. St. Louis & South Western Railway Co., 249 U. S. 134, 142, and St. Louis, Iron Mountain & Southern Railway Co. v. Hasty, 255 U. S. 252, 256, the Supreme Court held that direct appeals were authorized because the decrees appealed from were entered in cases which involved the construction and application of the Federal Constitution, within the meaning of Section 238 of the Judicial Code. Manifestly those cases are not in point.

In Leman v. Krentler-Arnold Hinge Last Co., 284 U. S. 448, 457, no question of direct appeal was involved at all.

Tenth. In subdivision 7 of each jurisdictional statement filed by appellants Pendergast and O'Malley, appellant asserts that the three-judge court erred in certain respects. These assertions of error go to the merits, and have no place in appellants' jurisdictional statements. Appellee therefore [sumits] no response thereto in this [fol. 389] jurisdictional statement, and reserves its reponse until such time as it may file its brief on the merits.

WHEREFORE plaintiff (appellee), United States of America, moves that the appeals taken to the Supreme

Court of the United States on July 2, 1941, by defendants Thomas J. Pendergast and Robert Emmett O'Malley, respectively, by the filing of their respective notices of appeal, and by the filing of their respective petitions for appeal accompanied by assignments of error, be dismissed.

Respectfully submitted,

Richard K. Phelps
William S. Hogsett
Counsel for Plaintiff (Appellee)
United States of America

Received copies hereof this 11th day of July, 1941.

John G. Madden
Counsel for Defendant (Appellant)
Thomas J. Pendergast

James P. Aylward
George V. Aylward
Ralph M. Russell
Counsel for Defendant (Appellant)
Robert Emmett O'Malley

Filed in the United States District Court July 11, 1941

[fol. 390] (Praecipe for Transcript by Defendant, Thomas J. Pendergast.)

TO: A. L. ARNOLD, CLERK OF THE ABOVE COURT:

Please prepare transcript of record in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, not later than the return day of the citation herein or any enlargement thereof, and include in said transcript the following pleadings, proceedings, rulings, entries, bill of exceptions, exhibits and papers on file, constituting the complete record and all proceedings and evidence in the action, viz:

(1) Information in contempt filed July 13, 1940.

(2) Rule to show cause, directed to defendants, on July 13, 1940.

(3) Motion of Thomas J. Pendergast to Abate and Quash Information and Withdraw Rule to Show Cause, filed August 31, 1940.

[fol. 391] (4) Order overruling Motion to Abate and Quash Information and Rule to Show Cause, filed by the Court November 14, 1940.

(5) Opinion of the Court overruling motion to abate and quash information and withdraw rule to show cause, filed by the Court November 14, 1940.

(6) Order allowing exceptions to the order of the Court, filed November 14, 1940, overruling motions to abate and quash information and withdraw rule to show cause, filed November 18, 1940.

(7) Application of Thomas J. Pendergast to extend time for pleading and to join with a plea of not guilty other pleas and defenses.

(8) Order granting leave to Thomas J. Pendergast to extend time for pleading and to join with a plea of not guilty other pleas and defenses.

(9) Return and answer of Thomas J. Pendergast to rule to show cause and information.

(10) Bill of exceptions and transcript including: (a) motion of Thomas J. Pendergast to abate and quash information and withdraw rule to show cause, together with ruling thereon and exceptions allowed; (b) all testimony and proceedings before the Court on April 14 and 15, 1941 and June 7, 1941, including all rulings, findings of the Court, exceptions allowed, and all exhibits, stipulations (including records, documents, exhibits, or evidence specified therein) and proof introduced in said cause, as well as all motions, together with the rulings thereon and the exceptions thereto.

[fol. 392] (11) Motion of Thomas J. Pendergast at the close of the evidence of the United States to find and declare said defendant not guilty, filed April 15, 1941.

(12) Motion of Thomas J. Pendergast at the close of all of the evidence to find and declare said defendant not guilty, filed April 15, 1941.

(13) Opinion of the Court in finding and adjudging defendant Thomas J. Pendergast guilty of contempt, filed on May 28, 1941.

(14) Formal judgment of conviction and sentence rendered June 7, 1941, including order of the Court purporting to restyle and re-entitle criminal cause No. 5040 on the criminal docket of the Central Division of the Western District of Missouri "A proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive", filed by the Court on June 7, 1941.

(15) Motion of Thomas J. Pendergast for a new trial, filed June 2, 1941 and refiled June 7, 1941.

(16) Rulings of the Court on objections to admissibility and limitation of evidence, filed June 7, 1941.

(17) Order overruling motion for new trial of Thomas J. Pendergast, and exceptions thereto, filed June 7, 1941.

(18) Order appointing William S. Hogsett and Richard K. Phelps Amici Curiae to prosecute the appeal on behalf of the appellee, and exceptions allowed thereto made and filed by the Court June 7, 1941.

(19) Notice of appeal and grounds of appeal filed by [fol. 393] Thomas J. Pendergast on June 7, 1941.

(20) Order directing defendant Thomas J. Pendergast or his counsel to restyle and re-entitle pleadings and allowances of exceptions thereto, filed July 2, 1941.

(21) Petition for appeal, Order Allowing Appeal, Bail Bond, Cost Bond, Assignment of Errors, Citation to Appellee, and Notice of Appeal, with appropriate acknowledgments of service upon appellee, all filed by Thomas J. Pendergast on June 7, 1941.

(22) A certificate of the Clerk of the District Court of the United States for the Western District of Missouri to the effect that the number of this cause (5040) is a number on the criminal docket of the District Court of the United States for the Central Division of the Western District of Missouri.

(23) The order or orders of the Court enlarging time for the docketing of the appeal by Thomas J. Pendergast or for the taking of other procedural steps incident to such appeal.

(24) This praecipe with acknowledgment of service thereon.

You are requested to prepare this transcript as required by law and the rules of this Court and the rules of the Circuit Court of Appeals of the United States for the

Eighth Circuit, and to file the same in the office of the said United States Circuit Court of Appeals at the City of St. Louis, Missouri, on or before the first day of September, 1941, or at such later date as may be designated in an order of this Court enlarging and extending said time.

[fol. 394] Dated this 23 day of July, 1941.

R. R. Brewster
John G. Madden
James E. Burke
Attorneys for Appellant
Thomas J. Pendergast.

Service of above praecipe acknowledged
this 23 day of July, 1941.

Richard K. Phelps
United States Attorney & Amicus Curiae
William S. Hogsett
Amicus Curiae
By Hale Houts
Attorneys for Appellee

Filed in the United States District Court July 23, 1941

[fol. 395] (Praecipe for Transcript by Defendant, Robert Emmett O'Malley.)

TO: A. L. ARNOLD, CLERK OF THE ABOVE COURT:

Pursuant to Rule Thirteen (13) of the United States Circuit Court of Appeals for the Eighth Circuit, providing that appellant designate parts of the record which he thinks material for consideration of the errors assigned, and in order to enable you, in your official capacity, to perform the duty of making and submitting to the United States Circuit Court of Appeals for the Eighth Circuit a true copy of the material parts of the record, in compliance with said rule, and for the purpose of eliminating all papers not necessary to the consideration of the questions to be reviewed, you are hereby respectfully requested to make a transcript of the record to be filed in the United States Circuit Court of Appeals for the Eighth

Circuit, pursuant to an appeal heretofore allowed in the above entitled cause, and to include in such transcript of record the following, and no other, papers, to-wit:

(1) Information in contempt filed July 13, 1940.

(2) Rule to Show Cause, directed to defendants by the Court on July 13, 1940.

[fol. 396] (3) Motion of Robert Emmet O'Malley to Abate and Quash Information and Withdraw Rule to Show Cause, filed August 31, 1940.

(4) Order overruling Motion to Abate and Quash Information and Rule to Show Cause, filed by the Court November 14, 1940.

(5) Opinion of the Court overruling Motion to Abate and Quash Information and Withdraw Rule to Show Cause, filed by the Court November 14, 1940.

(6) Order allowing exceptions to the order of the Court, filed November 14, 1940, overruling motions to abate and quash information and withdarw rule to show cause, filed November 18, 1940.

(7) Return of Robert Emmet O'Malley to rule to show cause and information, filed December 18, 1940.

(8) Order granting leave to Robert Emmet O'Malley to extend time for pleading and to join with a plea of not guilty, other pleas and defenses involved, or otherwise, filed December 18, 1940.

(9) Application of Robert Emmet O'Malley to extend time for pleading and to join with a plea of not guilty, other pleas and defenses, filed December 18, 1940.

(10) Bill of exceptions and transcript including: (a) motion of Robert Emmet O'Malley to abate and quash information and withdraw rule to show cause, together with ruling thereon and exceptions allowed; (b) all testimony and proceedings before the Court on April 14 and 15, 1941 and June 7, 1941, including all rulings, findings of the Court, exceptions allowed, and all exhibits, stipulations (including records, documents, exhibits, or evidence specified therein) and proof introduced in said cause, as well as all motions, together with the rulings thereon and the exceptions thereto.

(11) Motion of Robert Emmet O'Malley at the close of the Government's evidence to find and declare defendant not guilty, filed April 15, 1941.

[fol. 397] (12) Motion of Robert Emmet O'Malley at the close of all of the evidence to find and declare defendant not guilty, filed April 15, 1941.

(13) Opinion of the Court in finding and adjudging defendant guilty of contempt, filed by the Court on May 28, 1941.

(14) Formal judgment of conviction and sentence rendered June 7, 1941, including order of the Court purporting to restyle and re-entitle criminal cause No. 5,040 on the criminal docket of the Central Division of the Western District of Missouri "A proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive", filed by the Court on June 7, 1941.

(15) Motion of Robert Emmet O'Malley to revoke order adjudging defendant guilty of contempt and for a new trial and rehearing, filed June 2, 1941 and refiled June 7, 1941.

(16) Rulings of the Court on objections to admissibility and inadmissibility of evidence introduced at the trial, filed by the Court on June 7, 1941.

(17) Order overruling motion to revoke order adjudging defendant guilty of contempt and for rehearing and new trial, and exceptions thereto made and filed by the Court June 7, 1941.

(18) Order appointing William S. Hogsett and Richard K. Phelps [Amicis] Curiae to prosecute the appeal on behalf of the appellee, and exceptions allowed thereto made and filed by the Court June 7, 1941.

(19) Notice of Appeal and Grounds of Appeal, filed by Robert Emmet O'Malley on June 7, 1941.

(20) Order directing defendant Robert Emmet O'Malley to restyle and re-entitle pleadings and allowances of exceptions thereto, filed July 2, 1941.

(21) Petition for Appeal, Order Allowing Appeal, Bail Bond, Cost Bond, Assignment of Errors, Citation to Appellees and Notice of Appeal, all filed June 7, 1941.
[fol. 398] (22) A certificate of the Clerk of the District Court of the United States for the Western District of

Missouri to the effect that the number of this cause (5,040) is a number on the criminal docket of the District Court of the United States for the Central Division of the Western District of Missouri.

(23) The order or orders of the Court enlarging time for the docketing of the appeal by Robert Emmet O'Malley or for the taking of other procedural steps incident to such appeal.

(24) This praecipe with acknowledgment of service thereon.

You are requested to prepare this transcript as required by law and the rules of this Court and the rules of the United States Circuit Court of Appeals, and to file the same in the office of the United States Circuit Court of Appeals for the Eighth Circuit in the City of Saint Louis, Missouri, on or before the 1st day of September, 1941, or at such later date as may be designated in an order of this Court enlarging and extending said time.

DATED THIS 23rd day of July, 1941.

James P. Aylward
George V. Aylward
Terence M. O'Brien
Ralph M. Russell
Attorneys for Appellant

SERVICE OF ABOVE PRAECIPE accepted and acknowledged this 23 day of July, 1941.

Richard K. Phelps
Asst United States Attorney & Amicus Curiae
By

Filed in the United States District Court July 23, 1941

[fol. 399] (Praecipe for Transcript by Appellee.)

TO THE CLERK OF THE AFORESAID DISTRICT COURT:

In the certified record or transcript to be sent by you to the Supreme Court of the United States on the appeals to that court by defendants Thomas J. Pender-

gast and Robert Emmett O'Malley, and in the record or transcript to be sent by you to the United States Circuit Court of Appeals for the Eighth Circuit on the appeals to that court by defendants Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, you will please include the following:

1. All motions to abate or quash filed by said defendants, or any of them.

2. All pleas, answers and returns filed by said three defendants.

3. The opinion of the court, including findings of fact and conclusions of law, filed on June 7, 1941.

4. The order of court filed on said date overruling motions for new trial.

[fol. 400] 5. All notices of appeal to the Circuit Court of Appeals, filed by all defendants.

6. All petitions for appeal to the Circuit Court of Appeals, and all assignments of error filed in connection therewith, filed by all defendants.

7. The orders allowing said petitions for appeal to the Circuit Court of Appeals, entered June 7, 1941.

8. The notices of appeal to the Supreme Court of the United States filed by defendants Thomas J. Pendergast and Robert Emmett O'Malley on June 12, 1941.

9. The appellee's jurisdictional statement and motion to dismiss the appeals to the Supreme Court by defendants Thomas J. Pendergast and Robert Emmett O'Malley, by notices filed June 12, 1941.

10. The appellee's jurisdictional statement and motion to dismiss the appeals to the Supreme Court by defendants Pendergast and O'Malley, by notices of appeal and petitions for appeal filed July 2, 1941, —said jurisdictional statement and motion having been filed on July 11, 1941.

11. Of the proceedings, files and records in the Insurance Rate Cases (being Equity Cases Nos. 270 to 426, inclusive), include the following:

(a) The original bill in equity in Case No. 270.

(b) The order convening the three-judge court in Case No. 270.

(c) The amendment to the bill in Case No. 270.

(d) The amended and supplemental bill in equity in Case No. 270.

[fol. 401] (e) The interlocutory injunction in Case No. 270.

(f) The orders appointing a custodian and successor custodians in Case No. 270.

(g) All answers of defendants to original bill in equity in Case No. 270.

(h) All answers of defendants to amended and supplemental bill in equity in Case No. 270.

(i) The order of reference to a master in Case No. 270.

(j) The motions for decree filed in Case No. 270 on June 17, 1935.

(k) The stipulation filed in Case No. 270 on June 19, 1935.

(l) The reporter's transcript of the hearing in said equity cases on June 22, 1935.

(m) The following portions of the "Brief of Plaintiff in Opposition to Petition of Certain Parties for Leave to Intervene" in Equity Case No. 273, filed July 3, 1935: All of page 1 except the last two lines, all of page 10 except the first two lines; the first paragraph on page 33; beginning with the last three lines on page 53 and ending with the sixth line on page 54; beginning with the last two words in the sixth line on page 60 and continuing to the end of said page.

(n) The "Suggestions of Defendant R. E. O'Malley, Superintendent of Insurance" in Case No. 273, filed July 3, 1935.

[fol. 402] (o) The "Suggestions of Defendant R. E. O'Malley, Superintendent of Insurance, in Support of Settlement, and in Opposition to Petition for Leave to Intervene."

(p) The reporter's transcript of the hearing on October 26, 1935, in said Equity Cases Nos. 270 to 426.

(q) Of the "Brief of Plaintiff in Answer to Amended Petition and Briefs of Petitioners in Support Thereof,"

filed November 2, 1935, include the following: Beginning at the top of page 1 and ending with the first paragraph on page 12; beginning with the blackfaced heading on page 19 and ending with the twenty-sixth line on page 23; beginning with the blackfaced heading on page 29 and ending with the eleventh line on page 33; beginning with the fifth line from the bottom of page 36 and ending with the second paragraph on page 38; beginning with the last two lines on page 43 and ending with the eighth line on page 44; all of pages 50 and 51.

(r) Memorandum-opinion on intervention in said Equity Cases 273 to 426, inclusive, filed November 13, 1935.

(s) Of the reporter's transcript of the hearing on January 24, 1936, in said Equity Cases Nos. 270 to 426, include the following: All of page 1 and the first four lines on page 2; the sixth to tenth lines on page 36; beginning with the fourth line on page 46 to the end of said transcript on page 70.

[fol. 403] (t) The decree of February 1, 1936, in said equity cases.

(u) The "Suggestion by Maurice M. Milligan, United States Attorney, as Amicus Curiae, that the Court Should Order an Accounting and Report by Robert J. Folonie, the Surviving Trustee," with accompanying exhibits, filed in Equity Case No. 270 and related cases between 270 and 426, on February 7, 1939.

(v) Of the reporter's transcript of the hearing on May 29, 1939, in Equity Cases Nos. 270 to 426, include the following: From the beginning on page 1 to the end of the ninth line on page 8; beginning with the last line on page 14 and ending with the eighteenth line on page 17; beginning with the tenth line on page 26 and ending with the first sentence on page 27; beginning with the thirteenth line on page 29 and including all but the last three lines on page 30.

(w) The "Motion of Defendant Lucas for Citation," filed May 29, 1939, in said Equity Cases 270 to 426, inclusive.

(x) The "Order of Restitution" dated May 29, 1939, in said equity cases.

(y) The "Order of Restitution" dated June 1, 1939, in said equity cases.

(z) The "Order to Show Cause" dated May 29, 1939, in said equity cases.

(aa) The "Order Appointing Special Master, Prescribing his Duties, etc.," dated July 3, 1939, in said Equity Cases 270 to 426, inclusive.

[fol. 404] (bb) Of the transcript of the hearing on May 20, 1940, in said equity cases, include the following: All of pages 1 and 2 and the first three lines of page 3; and following the extended arguments of counsel for the parties, include the following: Beginning with the twelfth line from the bottom of page 85 and ending with the first paragraph on page 87.

(cc) Opinion of the court directing restitution to the policyholders, filed August 14, 1940, in said equity cases.

(dd) The findings of fact, conclusions of law and decree of the court, filed August 14, 1940.

(ee) The opinion of the court on plaintiffs' motion for new trial in said equity cases, filed April 12, 1941.

12. All praecipes filed by appellants.

13. This praecipe.

Richard K. Phelps,
William S. Hogsett
Counsel for Plaintiff (Appellee) United States of America

Received copies hereof this 30th day of July, 1941.

R. R. Brewster
John G. Madden
Counsel for Defendant (Appellant) Thomas J. Pendergast

Ralph M. Russell
Counsel for Defendant (Appellant) Robert Emmett O'Malley

Filed in the United States District Court July 30, 1941

[fol. 405] (Transcript of Testimony.)

In the District Court of the United States for the Western District of Missouri Central Division United States of America, Plaintiff, -vs- Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack, Defendants. No. 5040 A proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

BE IT REMEMBERED, that on Saturday, the 31st day of August, 1940, the defendants, Thomas J. Pendergast and Robert Emmett O'Malley, filed their MOTIONS TO ABATE AND QUASH INFORMATION AND WITHDRAW RULE TO SHOW CAUSE, which said motions are in words and figures as follows:

(Motion of Thomas J. Pendergast to Abate and Quash Information and Withdraw Rule to Show Cause.)

"In the District Court of the United States for the Western District of Missouri, Central Division United States of America, Plaintiff, vs Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack, Defendants. No. 5040 A proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

BEFORE THE HONORABLE JUDGES KIMBROUGH STONE ALBERT L. REEVES MERRILL E. OTIS

[fol. 406] Comes now defendant, Thomas J. Pendergast, and moves the Court to abate and quash the Information filed herein and to withdraw the rule to show cause based thereon for the following reasons:

(1)

This three-judge District Court is a Court of limited statutory jurisdiction and is without jurisdiction, power or right to hear, determine, or act in these contempt proceedings.

(2)

Neither the regular one-judge District Court for the Central Division of the Western District of Missouri, nor this three-judge District Court has jurisdiction, power or right summarily to proceed against, try or punish this

defendant for the alleged contempt or for the alleged contemptuous acts stated in the Information to have been committed by this defendant because such alleged contempt did not constitute misbehavior on the part of this defendant in the presence of the District Court for the Central Division of the Western District of Missouri or of this Court or so near thereto as to obstruct the administration of justice within the meaning of Section 385 of Title 28 U.S.C.A.

(3)

The Information filed herein does not state facts sufficient to constitute a contempt of this Court.

[fol. 407]

(4)

It appearing on the face of the Information that the alleged contemptuous acts charged to this defendant were not committed in the presence of the Court or so near thereto as to obstruct the administration of justice, said Information is inufficient to support or authorize a rule to show cause why this defendant should not be held in contempt.

(5)

The Information filed herein charges this defendant with the commission of acts, for which alleged acts this defendant was indicted by a Grand Jury in the United States District Court for the Western Division of the Wetern District of Missouri on July 13th, 1940; a copy of which indictment is attached hereto, marked Exhibit 'A', and incorporated herein by reference as though set out herein in full; that said indictment is based on an alleged violation of a criminal statute of the United States (Section 241 of Title 18), punishable by fine and imprisonment; that said indictment is now pending in said Court; that the allegations of the Information filed herein and the allegations of said indictment, in so far as they attempt to charge this defendant with wrongful acts, are in substance the same; that the evidence necessary to prove the allegations of the Information is identical with the evidence necessary to prove the allegations of the indictment; that, therefore, this Court has no power or authority or right under the Constitution and laws of [fol. 408] the United States to proceed to try this defendant for contempt.

(6)

To require this defendant to undergo a trial on the Information for contempt and also to undergo a trial on the aforesaid indictment, would violate defendant's constitutional right, contained in Amendment 5 of the Constitution of the United States, not to be subject for the same offence to be twice put in jeopardy.

(7)

To require this defendant to undergo a trial on the Information for contempt would violate defendant's constitutional right contained in Amendment 5 not to be held to answer for a capital or other infamous crime unless on a presentment or indictment of a Grand Jury, and his constitutional right contained in Amendment 6 to a trial by an impartial jury.

(8)

By Section 385 of Title 28 U.S.C.A., the Congress of the United States provided that the power of the federal courts to punish for contempts of their authority shall not extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness or other person to any [fol. 409] lawful writ, process, order, rule, decree, or command of the said courts.

By Section 241 of Title 18 U.S.C.A., the Congress provided for the punishment of those who corruptly influenced, obstruct or impede the due administration of justice in any Court of the United States.

Said Sections 285 and 241 (which originated in a common act, the Act of March 2, 1831) complement each other and were not intended to and do not provide for double prosecution or double punishment for the commission of the same act or acts.

The allegations in the Information upon which the charge of contempt of court is based are identical with the allegations set out in the indictment returned against this defendant, as heretofore set out; that the allegations of the Information, if proved, would prove the allegations

of the indictment and that the allegations of the indictment, if proved, would prove the allegations of the Information; that, therefore, this defendant is entitled under the law to the protection afforded him by the Amendments to the Constitution of the United States commonly called the Bill of Rights and he may not lawfully be required to answer said Information and Rule or Order to Show Cause or to be tried thereon.

(10)

The Information filed herein shows upon its face that [fol. 410] the alleged contemptuous acts charged against this defendant were committed more than three years prior to the filing of the Information herein, that, therefore, any prosecution for said alleged contemptuous acts is barred by the statute of limitations in such case made and provided.

WHEREFORE, this defendant respectfully moves the Court to abate and quash the Information filed herein and to withdraw the Rule to Show Cause heretofore issued by this Court.

Thomas J. Pendergast.

R. R. Brewster
John G. Madden
Attorneys for Thomas J. Pendergast.

[fol. 411] Exhibit A.

(Indictment)

In the District Court of the United States of America for the Western District of Missouri Western Division
United States of America, Plaintiff, v. T. J. Pendergast, R. E. O'Malley, A. L. McCormack, Defendants.
No. 14912

The grand jurors of the United States of America, duly and legally chosen, selected, summoned and drawn from the body of the Western District of Missouri, and duly and legally empanelled, sworn, and charged to inquire of and concerning crimes and offenses against the United States of America in the Western District of Missouri, upon their oaths present and charge that T. J. Pender-

gast, R. E. O'Malley and A. L. McCormack, whose more full and true names are not known to the members of this grand jury, and who are hereinafter sometimes referred to as the defendants, together with Charles R. Street and divers other persons whose names are unknown to the grand jurors who are likewise referred to herein as defendants, at Kansas City, Jackson County, Missouri, within the Western Division of the Western Judicial District of the said state of Missouri, and within the jurisdiction of this court, prior to the commission of the said [fol. 412] overt act hereinafter set forth in this indictment did unlawfully, wilfully, knowingly, feloniously and corruptly conspire, combine, confederate and agree together and with each other and to and with divers other persons whose names are unknown to the members of this grand jury in violation of Section 88, Title 18 of the United States Code, Annotated, to commit an offense against the United States in violation of Section 241 of Title 18 of the United States Code Annotated by endeavoring to influence, obstruct or impede the due administration of justice in a certain United States Court, to wit, a three judge equity court sitting in and for the Western Judicial District of the state of Missouri;

At all times mentioned in this indictment there was pending in the District Court of the United States of the Western Judicial District of the state of Missouri a certain cause entitled American Insurance Company, a corporation, plaintiff, vs. Joseph B. Thompson, Superintendent of the Insurance Department of the state of Missouri, and Stratton Shartel, Attorney General of the state of Missouri, defendants, which action so pending in the District Court of the United States aforesaid was an action in equity in which by due and proper motion and order from time to time substitutions were made for the names of defendants who were the duly elected, acting, and qualified officers of the state of Missouri as these officials would change in the regular course of elections at which [fol. 413] successors would be chosen for them; that this cause of action aforesaid in equity bore the docket number 270 and was filed on the 25th day of May 1930 with the Clerk of the District Court for the Central Division in the Western Judicial District of the state of Missouri at Jefferson City, Missouri, and with which action at or near the same time were filed companion cases brought by divers and various insurance companies of the United

States against the same defendants and all of which were actions of similar character and which were consecutively numbered upon the docket of the court from 271 to 426, inclusive, and in which companion cases it was ordered by the court, that every motion, pleading and order made in the case of the American Insurance Company, a corporation, vs. Joseph B. Thompson, Superintendent of the Insurance Department of the state of Missouri, and Stratton Shartel, Attorney General of the state of Missouri, defendants, having docket number 270 should likewise be made in each and every one of the companion cases consecutively numbered 271 to 426, inclusive; that this action in equity aforesaid and the companion cases filed therewith hereinbefore described and consecutively numbered from 270 to 426, inclusive, were actions in which the plaintiffs prayed for restraining orders and interlocutory injunctions until such time as a hearing could be held upon the merits of said causes to prevent the said defendants, their solicitors, attorneys, agents and deputies from attenpting to interfere in any way with the plain-
[fol. 414] tiff in the demand, collection, receiving and retaining premium charges for fire insurance and windstorm insurance as set forth in the notice duly filed by the plaintiff with the defendant, Superintendent of Insurance, on the 30th of December 1929; that an order had been made by said court granting to the plaintiff the relief prayed for as above set forth and that therewith was filed an order appointing W. T. Kemper of Kansas City, Missouri, as custodian of monies which by said order were to be impounded and which fund so to be impounded represented 16-2/3 per cent of all premium charges upon all policies of fire and windstorm insurance written in the state of Missouri by the plaintiff companies, said 16-2/3 per cent further representing the difference between the rate premium charge for fire and windstorm insurance approved by the State Superintendent of Insurance and that provided for in the new rates to be charged by insurance companies writing windstorm and fire insurance in the state of Missouri contained in the notice hereinbefore mentioned filed with the Superintendent of Insurance on the 30th of December 1929; that a Special Master was appointed by the said United States District Court to take testimony in all of said cases filed as aforesaid and consecutively numbered upon the docket of the court from 270 to 426, inclusive, for the purpose

of ascertaining and determining a true and proper rate of insurance premium charges for hail and windstorm insurance and to make a report and recommendations in accordance therewith to the court; that at all times men- [fol. 415] tioned in this indictment these causes were pending before the said United States Court for the Western Judicial District of Missouri, and to a certain date hereinafter mentioned, to wit, on or about the 1st of February 1936, no hearing had been had upon the merits in any of the causes hereinbefore described and which were consecutively numbered upon the docket of the court from 270 to 426, inclusive, and that said cause had not been finally determined, and that the monies so impounded and so paid over to the custodian appointed as hereinbefore set forth by the court to said certain date of the 1st of February 1936 amounted to the sum of more than $8,000,000.00;

It was the purpose and object of the conspiracy and of the said defendants and each and all of them that they, the said T. J. Pendergast, R. E. O'Malley, A. L. McCormack and Charles R. Street, would and did attempt to obtain the payment of a large sum of money from certain insurance companies who were parties plaintiff in the equity cases hereinbefore referred to, being numbered upon the docket of the court from 270 to 426, inclusive, which large sum of money they would and did pretend and state to the insurance companies was to be used for legal expenses in settling and compromising all of said cases so pending before the District Court of the United States, as aforesaid; that the large sum of money so obtained from divers and various insurance companies, parties plaintiff in the above-described litigation; would be [fol. 416] and was divided between T. J. Pendergast, R. E. O'Malley and A. L. McCormack; that upon the division of the said large sum of money between the three defendants, T. J. Pendergast, R. E. O'Malley and A. L. McCormack, they would and did obtain the influence of Charles R. Street with the various and divers insurance companies, parties plaintiff in the litigation hereinbefore described, to agree and accede to, and they would and did induce R. E. O'Malley, Superintendent of Insurance for the state of Missouri, to agree and accede to a compromise and settlement of all the litigation hereinbefore described, by the terms of which compromise and settlement there would be distributed out of the monies im-

pounded by order of the court, as hereinbefore set out, approximately 80 per cent for the insurance companies, to be proportionately divided among them according to the interest of each of them therein, and approximately 20 per cent would be refunded to the policy holders; that after having induced the various insurance companies, parties plaintiff in the litigation hereinbefore described, and the State Superintendent of Insurance to agree and accede to the compromise and settlement hereinbefore described, the defendants, and each and all of them, the said T. J. Pendergast, R. E. O'Malley and A. L. McCormack, would and did attempt to induce and procure from the United States District Court, before which all of the said causes hereinbefore described were pending, a decree ratifying and embodying all of the provisions fraudulently [fol. 417] and corruptly agreed upon in the said compromise and settlement hereinbefore described; that they, the said defendants, and each of them, the said T. J. Pendergast, R. E. O'Malley and A. L. McCormack, would and did attempt to procure, by the corrupt, fraudulent and unlawful means hereinbefore described, the distribution of all the money impounded to the various insurance companies who were parties plaintiff as aforesaid, upon the one hand, and to the policy holders upon the other, and that they would and did continue to work together in concerted action until all of said money had been finally and completely distributed, and until all of the causes had been finally determined and disposed of by the said United States District Court sitting as aforesaid; and that they, the said defendants, and each and all of them, the said T. J. Pendergast, R. E. O'Malley and A. L. McCormack, would and did keep secret all of the frauduent and corrupt plans, negotiations and agreements hereinbefore described, and would and did prevent the said United States District Court from discovering the fraudulent and corrupt means employed, by which the said decree of the said United States District Court was obtained, as hereinbefore set out, and that they would and did continue to endeavor to conceal all of the corrupt and fraudulent agreements made by them hereinbefore described until after all of said causes were finally determined and completely disposed of by the said United States District Court, as aforesaid;

[fol. 418] That after the formation of said unlawful conspiracy and in pursuance thereof and to effect the object

and purposes thereof, and while said conspiracy was in force and in effect, the defendants did, among other things, certain acts hereinafter designated as overt acts, as follows:

OVERT ACTS

I

In the early part of the year 1935 the defendant A. L. McCormack had a conference with R. E. O'Malley, who in 1935 was the duly elected, qualified and acting Superintendent of Insurance for the State of Missouri, and was successor defendant to Joseph B. Thompson in all of the suits in equity heretofore described having consecutive docket numbers from 270 to 426, inclusive, in the City of St. Louis, Missouri, in which the said R. E. O'Malley asked the defendant, A. L. McCormack to go to Chicago to interview Charles R. Street, Chairman of the Committee of fire insurance companies, for the purpose of determining if the said Charles R. Street would be willing to discuss the matter of a settlement and compromise of all the suits in equity heretofore described, and consecutively numbered on the docket of said United States District Court from 270 to 426, inclusive, with the said T. J. Pendergast; that within a few days thereafter the defendant A. L. McCormack went to Chicago, interviewed the said Charles R. Street at his office in the Strauss [fol. 419] Building on Michigan Boulevard in the said City of Chicago, and was advised by the said Charles R. Street that he would meet the said T. J. Pendergast to discuss with him the matter of a settlement and compromise of the fire insurance rate litigation and the distribution of impounded funds.

II

That shortly thereafter, at St. Louis, Missouri, the defendant A. L. McCormack told the defendant R. E. O'Malley that the said Charles R. Street would meet the defendant T. J. Pendergast in Chicago for the purpose of attempting to effect a compromise and settlement of the litigation pending as aforesaid.

III

Within a week or two thereafter the defendants T. J. Pendergast and A. L. McCormack met the said Charles

R. Street at the Palmer House, a hotel in the City of Chicago, and that at that meeting and conference Mr. Street told Mr. Pendergast that he would be willing to pay a fee in order to get the matters, then in controversy between the fire insurance companies and the State Superintendent of Insurance then pending for a hearing upon the merits before the United States District Court as aforesaid, compromised and settled, and that it was then and there agreed the defendant T. J. Pendergast was to receive a fee of $500,000 if he could get the cases compromised and settled.

[fol. 420]

IV

That a few weeks thereafter the defendant A. L. McCormack delivered $50,000 in United States currency to T. J. Pendergast at the office of the said T. J. Pendergast at 1908 Main Street in Kansas City, Missouri, the said $50,000 representing the first installment to be paid upon the fee to be paid by Charles R. Street to T. J. Pendergast, and that the said T. J. Pendergast received and retained the said $50,000.

V

That sometime after the transaction set forth in overt act IV next above, the exact day and date being unknown to the members of this grand jury, the defendant A. L. McCormack received $50,000 in United States currency from Charles R. Street in Chicago, Illinois, and delivered the same to the defendant T. J. Pendergast at his office at 1908 Main Street, Kansas City, Missouri; that the said T. J. Pendergast received the said $50,000 retained $5,000 thereof, returning to the defendant A. L. McCormack the sum of $45,000, and that the defendant A. L. McCormack delivered $22,500 of this to the defendant R. E. O'Malley and retained $22,500 for himself.

VI

That sometime thereafter, the exact day and date being unknown to the members of this grand jury, but being in the year 1935, a conference was held at the Muehlebach Hotel in Kansas City, Missouri, which was attended by Charles R. Street and various attorneys for the insur-
[fol. 421] ance companies, and R. E. O'Malley, the State Superintendent of Insurance, and divers other persons, at which a compromise and settlement of the fire insurance

rate litigation and the distribution of the monies impounded by order of this Court was agreed upon, which said agreement was substantially in all particulars the same as is recited in the stipulation hereinbefore referred to and filed with the United States District Court on the 19th of June, 1935.

VII

That sometime in the early part of the year 1936, the defendant A. L. McCormack received from Charles R. Street in Chicago, Illinois, the sum of $330,000 in United States currency, which he delivered to the defendant T. J. Pendergast at his office at 1908 Main Street in Kansas City, Missouri; that the said T. J. Pendergast retained $250,000 of the said sum of $330,000 and returned to the said defendant A. L. McCormack the sum of $80,000, saying, "Here is $80,000, give half of it to Emmett" (meaning the defendant R. E. O'Malley), and that the said defendant A. L. McCormack delivered $40,000 to the defendant R. E. O'Malley in St. Louis, Missouri, and retained $40,000 for himself.

VIII

That thereafter on or about the 25th day of October, 1936, Charles R. Street transmitted by bank draft from Chicago, Illinois, to the defendant A. L. McCormack at [fol. 422] St. Louis, Missouri, $10,000, which the said defendant A. L. McCormack converted into United States currency and conveyed to Kansas City and delivered to T. J. Pendergast at the Menorah Hospital in Kansas City, Missouri.

IX

In the early part of March, 1939, the defendant A. L. McCormack appeared before a United States grand jury sitting at Kansas City, Missouri, for the Western Judicial District of the State of Missouri, to testify before the said United States grand jury concerning the transactions between himself, T. J. Pendergast, R. E. O'Malley, Charles R. Street and any other person or persons unknown to the members of the grand jury, in connection with the compromise and settlement of the litigation hereinbefore described, pending in the United States District Court. The said A. L. McCormack was called on numerous occasions by the United States grand jury sitting at Kansas City

in March, 1939, as aforesaid, and between sessions of the grand jury was frequently visited by and frequently visited the defendant R. E. O'Malley, on each of which occasions the defendant R. E. O'Malley requested of and importuned the defendant A. L. McCormack to refuse to disclose and to conceal from the said United States grand jury all of the fraudulent, corrupt and unlawful transactions between him and the other defendants herein named, and any other person or persons with whom he may have [fol. 423] had corrupt, fraudulent and unlawful agreements or negotiations, and not to disclose to the grand jury, to the United States Attorney or any of his Assistants or to any agents of the United States any payment of any money by Charles R. Street to the said A. L. McCormack for delivery to the defendant T. J. Pendergast or the defendant R. E. O'Malley.

X

That the said A. L. McCormack, so appearing before the United States grand jury sitting in Kansas City, Missouri, as aforesaid, in March of 1939 in his testimony before said grand jury refused time after time to reveal and disclose any of the corrupt, unlawful and fraudulent transactions between himself, Charles R. Street, R. E. O'Malley and T. J. Pendergast, to the United States grand jury, and refused to disclose to said grand jury the payment of any money or monies to any person or persons for the purpose of obtaining or influencing the fraudulent and dishonest settlement and compromise of all the litigation pending before the said United States Court for the Western Judicial District of the State of Missouri, and that by so refusing to reveal and disclose any of the things concerning which the grand jury inquired, but by denying the same said defendant A. L. McCormack committed wilful, deliberate and corrupt perjury and continued and kept in force the conspiracy and agreement which had theretofore been entered into between himself, Charles R. Street, R. E. O'Malley and T. J. Pendergast;

[fol. 424] And so the grand jurors aforesaid, upon their oaths aforesaid, do present and charge that T. J. Pendergast, R. E. O'Malley, A. L. McCormack, Charles R. Street and other persons to the grand jurors unknown, at the times and places aforesaid, by the means aforesaid, and in the manner and form aforesaid, did unlawfully, know-

ingly, fraudulently, feloniously and corruptly conspire, combine, confederate and agree together to and with each other and divers other persons to the grand jurors unknown to commit an offense against the United States of America, namely, to do acts and things made crimes against and in violation of the laws of the United States by Section 241 of Title 18 of the United States Code Annotated;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Acting United States Attorney

A TRUE BILL:

Foreman of the grand jury"

(Which said MOTION OF THOMAS J. PENDERGAST TO ABATE AND QUASH INFORMATION AND WITHDRAW RULE TO SHOW CAUSE was endorsed by the Clerk of the Court as follows:)

"FILED AUG 31 1940 A. L. ARNOLD, Clerk, By Edna D. Morris Deputy"

[fol. 425] (Motion of Defendant Robert Emmett O'Malley to Abate and Quash Information and Withdraw Rule to Show Cause.)

"In the District Court of the United States of America for the Western District of Missouri United States of America, Plaintiff, vs. Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack, Defendants. No. 5040 A proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

BEFORE JUDGES KIMBROUGH STONE ALBERT L. REEVES MERRILL E. OTIS

Comes now defendant Robert Emmett O'Malley and moves the court to abate, quash and for naught hold the information filed herein and to withdraw the rule to show cause, based thereon, and to discharge defendant Robert Emmett O'Malley, for the following reasons:

I

This Honorable Court is a court of special, restricted and limited statutory jurisdiction and power, impaneled for a specific purpose under and by virtue of Section 266 of the Judicial Code of the United States of America, Section 1, 43 U. S. Statutes at Large, 938, (Title 28, Section 380, U. S. C. A.) to perform the specific function and duty and to exercise the specific power and jurisdiction for which said statute provides, and said court is without jurisdiction, power, authority, or right to act, hear, determine, decide, or otherwise function in this [fol. 426] contempt proceeding.

II

Neither the Judge of the District Court for the Central Division of the Western District of Missouri nor this Honorable Court, consisting of three judges impeneled in the cause entitled, 'American Insurance Company, a Corporation, vs. Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri, and Stratton Shartel, Attorney General of the State of Missouri, Number 270', has any jurisdiction, power, authority, or right to try or to punish this defendant for the alleged contempt, or for the alleged contemptuous acts alleged in said information to have been committed by this defendant, for the reason that such alleged acts do not constitute contempt within the meaning of Section 268 of the Judicial Code of the United States of America, Section 268, 36 U. S. Statutes at Large, 1163, (Title 28, Section 385, U.S.C.A.) in that the acts alleged do not constitute misbehavior of said defendant in the presence of this court or the District Court aforesaid, or so near thereto as to obstruct the administration of justice within the meaning of said Section, and that the information filed herein shows upon its face that said alleged contemptuous acts with which this defendant is charged were not committed in the presence of this court, or so near thereto as to obstruct the administration of justice, and that, therefore, said information does not state facts sufficient to support a rule to show cause why this defendant should not be held in [fol. 427] contempt of this court.

III

The information filed herein upon which said rule to show cause is based charges this defendant with the commission of certain acts, for which such alleged acts, this defendant has been indicted by a grand jury in the United States District Court for the Western Division of the Western District of Missouri, entitled as follows: 'United States of America, Plaintiff, vs. T. J. Pendergast, R. E. O'Malley, A. L. McCormack, Defendants, No. 14,912', and United States of America, Plaintiff, vs. T. J. Pendergast, R. E. O'Malley, A. L. McCormack, Defendants, No. 14,937', which said indictments are attached hereto, marked Exhibits 'A' and 'B', and incorporated herein, by reference, with the same force and effect as though set out herein in haec verba; that said indictments are now pending in said court and that the allegations of the information filed herein and the allegations of said indictments charge this defendant with the same alleged acts and are in substance the same; that the evidence necessary to prove the allegations of this information is identical with the evidence necessary to prove the allegations of each of said indictments; and that for this court to proceed against or try to punish this defendant for contempt, or any order, judgment or decision of this court adjudging this defendant guilty of contempt, or any action of this court in the [fol. 428] premises, would be in violation of Article V of the Amendments to the Constitution of the United States which, in part, provides, 'No person shall * * * be deprived of life, liberty or property without due process of law', in that it would deprive this defendant of his liberty and property without due process of law.

IV

Any action of this court requiring defendant to undergo a trial on the information for contempt, and any order, judgment or decree of this court adjudging defendant guilty of contempt and any action of this court in the premises, would be in violation of Article V of the Amendments to the Constitution of the United States, which provides, in part, as follows: 'Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb', in that defendant would be forced, also, to undergo a trial on the aforesaid indictments, and defendant for the same offense would twice be put in jeopardy of life and limb.

V

Any action of this court requiring defendant to undergo a trial on the information for contempt, nd any order, judgment or decree of this court adjudging defendant, guilty of contempt, and any action of this court in the premises, would be in violation of Article V of the Amendments to the Constitution of the United States, which provides, in part, as follows: 'No person shall be [fol. 429] held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grant jury', in that any such action will hold and compel defendant to answer for an alleged infamous crime without a presentment or indictment by a grand jury, and in that the rule issued by this court requiring defendant to show cause why he should not be held in contempt, and the information filed herein, if it charges any offense, charges an offense against the peace and dignity of the United States, and not a contempt of this court.

VI

Any action of this court requiring defendant to undergo a trial on the information for contempt, and any order, judgment or decree of this court adjudging defendant guilty of contempt, and any action of this court in the premises, would be in violation of Article VI of the Amendments to the Constitution of the United States, which, in part, provides: 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury * * *', in that defendant would be denied the right to a trial by an impartial jury in a criminal prosecution.

VII

Section 268 of the Judicial Code of the United States of America, Section 268, 36 U. S. Statutes at Large, 1163, (Title 28, Section 385, U.S.C.A.) provides that the power of federal courts to punish for contempt of their authority shall not extend to any cases except the misbehavior of [fol. 430] any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or any other person, to any lawful writ, process, rule, decree, or com-

mand of the said courts. Section 135 of the Criminal Code of the United States of America, Section 135, 35 U. S. Statutes at Large, 1113, (Title 18, Section 241, U.S.C.A.) provides for the punishment of those who corruptly influence, obstruct, or impede, or endeavor to influence, obstruct or impede the due administration of justice in any court of the United States. Said Section 268 of the Judicial Code of the United States of America and Section 135 of the Criminal Code of the United States of America, (which originated as Sections 1 and 2 of the Act of March 2, 1831, complement each other and were not intended to, and do not, provide for double prosecution and double punishment of a defendant charged with the alleged commission of the same act or acts.

VIII

The facts alleged in the information upon which the charge of contempt of court is based and upon which the rule of this Honorable Court was issued are identical with the facts alleged and set out in the indictments aforesaid returned against this defendant in the United States District Court for the Western Division of the Western [fol. 431] District of Missouri, and that the allegations of the information, if proved, would prove the allegations of said information, and that, therefore, this defendant is entitled under the law to have the allegations of the indictment tried before an impartial jury, and that pending such trial he may not lawfully be required to answer said citation for contempt nor to be tried upon the information filed herein.

IX

The information filed herein shows upon its face that all of the alleged contemptuous acts complained of were committed more than one year prior to the institution of this contempt proceeding, and, therefore, such proceeding is barred by Section 25, 38 United States Statutes at Large, 740. (Title 28, Section 390, U.S.C.A.)

X

The information filed herein shows upon its face that all of the alleged contemptuous acts were committed more than three years prior to the filing of such information herein; and, therefore, any prosecution for said alleged

contemptuous acts is barred by the Statute of Limitations in such cases made and provided.

XI

The information filed herein does not state facts sufficient to constitute a contempt of this court.

[fol. 432] WHEREFORE, this defendant moves the court to abate and quash and for naught hold the information filed herein, to withdraw the rule to show cause heretofore issued by this court, and to discharge this respondent.

Robert Emmet O'Malley
Defendant.

James P. Aylward
George V. Aylward
Terence M. O'Brien
Attorneys for Robert Emmett O'Malley.

Service of above motion acknowledged this 30 day of August, 1940.

Richard K. Phelps
Acting United States Attorney.

[fol. 433] Exhibit A.

INDICTMENT

In The District Court Of The United States Of America For The Western District Of Missouri Western Division United States of America, Plaintiff, v. T. J. Pendergast, R. E. O'Malley, A. L. McCormack, Defendants. No. 14,912.

The grand jurors of the United States of America, duly and legally chosen, selected, summoned and drawn from the body of the Western District of Missouri, and duly and legally empanelled, sworn, and charged to inquire of and concerning crimes and offenses against the United States of America in the Western District of Missouri, upon their oaths present and charge that T. J. Pendergast, R. E. O'Malley and A. L. McCormack, whose more

full and true names are not known to the members of this grand jury, and who are hereinafter sometimes referred to as the defendants, together with Charles R. Street and divers other persons whose names are unknown to the grand jurors who are likewise referred to herein as defendants, at Kansas City, Jackson County, Missouri, within the Western Division of the Western Judicial District of the said state of Missouri, and within the jurisdiction of this court, prior to the commission of the said [fol. 434] overt acts hereinafter set forth in this indictment did unlawfully, wilfully, knowingly, feloniously and corruptly conspire, combine, confederate and agree together and with each other and to and with divers other persons whose names are unknown to the members of this grand jury in violation of Section 88, Title 18 of the United States Code Annotated, to commit an offense against the United States in violation of Section 241 of Title 18 of the United States Code Annotated by endeavoring to influence, obstruct or impede the due administration of justice in a certain United States Court, to wit, a three judge equity court sitting in and for the Western Judicial District of the state of Missouri;

At all times mentioned in this indictment there was pending in the District Court of the United States of the Western Judicial District of the state of Missouri a certain cause entitled American Insurance Company, a corporation, plaintiff, vs. Joseph B. Thompson, Superintendent of the Insurance Department of the state of Missouri, and Stratton Shartel, Attorney General of the state of Missouri, defendants, which action so pending in the District Court of the United States aforesaid was an action in equity in which by due and proper motion and order from time to time substitutions were made for the names of defendants who were the duly elected, acting, and qualified officers of the state of Missouri as these officials would change in the regular course of elections at which [fol. 435] successors would be chosen for them; that this cause of action aforesaid in equity bore the docket number 270 and was filed on the 25th day of May 1930 with the Clerk of the District Court for the Central Division in the Western Judicial District of the state of Missouri at Jefferson City, Missouri, and with which action at or near the same time were filed companion cases brought by divers and various insurance companies of the United States against the same defendants and all of which were

actions of similar character and which were consecutively numbered upon the docket of the court from 271 to 426, inclusive, and in which companion cases it was ordered by the court, that every motion, pleading and order made in the case of the American Insurance Company, a corporation, vs. Joseph B. Thompson, Superintendent of the Insurance Department of the state of Missouri, and Stratton Shartel, Attorney General of the state of Missouri, defendants, having docket number 270 should likewise be made in each and every one of the companion cases consecutively numbered 271 to 426, inclusive; that this action in before described and consecutively numbered from 270 to 426, inclusive, were actions in which the plaintiffs prayed for restraining orders and interlocutory injunctions until such time as a hearing could be held upon the merits of said causes to prevent the said defendants, their solicitors, attorneys, agents and deputies from attempting to interfere in any way with the plaintiff in the demand, collection, receiving and retaining premium [fol. 436] charges for fire insurance and windstorm insurance as set forth in the notice duly filed by the plaintiff with the defendant, Superintendent of Insurance, on the 30th of December 1929; that an order had been made by said court granting to the plaintiff the relief prayed for as above set forth and that therewith was filed an order appointing W. T. Kemper of Kansas City, Missouri, as custodian of monies which by said order were to be impounded and which fund so to be impounded represented 16-2/3 per cent of all premium charges upon all policies of fire and windstorm insurance written in the state of Missouri by the plaintiff companies, said 16-2/3 per cent further representing the difference between the rate of premium charge for fire and windstorm insurance approved by the State Superintendent of Insurance and that provided for in the new rates to be charged by insurance companies writing windstorm and fire insurance in the state of missouri contained in the notice hereinbefore mentioned filed with the Superintendent of Insurance on the 30th of December 1929; that a Special Master was appointed by the said United States District Court to take testimony in all of said cases filed as aforeaaid and consecutively numbered upon the docket of the court from 270 to 426, inclusive, for the purpose of ascertaining and determining a true and proper rate of insurance premium charges for hail and windstorm insurance and to

make a report and recommendations in accordance therewith to the court; that at all times mentioned in this in- [fol. 437] dictment these causes were pending before the said United States Court for the Western Judicial District of Missouri, and to a certain date hereinafter mentioned, to wit, on or about the 1st of February 1936, no hearing had been had upon the merits in any of the causes hereinbefore described and which were consecutively numbered upon the docket of the court from 270 to 426, inclusive, and that said cause had not been finally determined, and that the monies so impounded and so paid over to the custodian appointed as hereinbefore set forth by the court to said certain date of the 1st of February 1936 amounted to the sum of more than $8,000,000.00;

It was the purpose and object of the conspiracy and of the said defendants and each and all of them that they, the said T. J. Pendergast, R. E. O'Malley, A. L. McCormack and Charles R. Street, would and did attempt to obtain the payment of a large sum of money from certain insurance companies who were parties plaintiff in the equity cases hereinbefore referred to, being numbered upon the docket of the court from 270 to 426, inclusive, which large sum of money they would and did pretend and state to the insurance companies was to be used for legal expenses in settling and compromising all of said cases so pending before the District Court of the United States, as aforesaid; that the large sum of money so obtained from divers and various insurance companies, parties plaintiff in the above-described litigation, would be and was divided between T. J. Pendergast, R. E. O'Malley [fol. 438] and A. L. McCormack; that upon the division of the said large sum of money between the three defendants, T. J. Pendergast, R. E. O'Malley and A. L. McCormack, they would and did obtain the influence of Charles R. Street with the various and divers insurance companies, parties plaintiff in the litigation hereinbefore described, to agree and accede to, and they would and did induce R. E. O'Malley, Superintendent of Insurance for the state of Missouri, to agree and accede to a compromise and settlement of all the litigation hereinbefore described, by the terms of which compromise and settlement there would be distributed out of the monies impounded by order of the court, as hereinbefore set out, approximately 80 per cent for the insurance companies, to be proportionately divided among them according to the interest of

each of them therein, and approximately 20 per cent would be refunded to the policy holders; that after having induced the various insurance companies, parties plaintiff in the litigation hereinbefore described, and the State Superintendent of Insurance to agree and accede to the compromise and settlement hereinbefore described, the defendants, and each and all of them, the said T. J. Pendergast, R. E. O'Malley and A. L. McCormack, would and did attempt to induce and procure from the United States District Court, before which all of the said causes hereinbefore described were pending, a decree ratifying and embodying all of the provisions fraudulently and corruptly agreed upon in the said compromise and settlement here- [fol. 439] inbefore described; that they, the said defendants, and each of them, the said T. J. Pendergast, R. E. O'Malley and A. L. McCormack, would and did attempt to procure, by the corrupt, fraudulent and unlawful means hereinbefore described, the distribution of all the money impounded to the various insurance companies who were parties plaintiff as aforesaid, upon the one hand, and to the policy holders upon the other, and that they would and did continue to work together in concerted action until all of said money had been finally and completely distributed, and until all of the causes had been finally determined and disposed of by the said United States District Court sitting as aforesaid; and that they, the said defendants, and each and all of them, the said T. J. Pendergast, R. E. O'Malley and A. L. McCormack, would and did keep secret all of the fraudulent and corrupt plans, negotiations and agreements hereinbefore described, and would and did prevent the said United States District Court from discovering the fraudulent and corrupt means employed, by which the said decree of the said United States District Court was obtained, as hereinbefore set out, and that they would and did continue to endeavor to conceal all of the corrupt and fraudulent agreements made by them hereinbefore described until after all of said causes were finally determined and completely disposed of by the said United States District Court, as aforesaid;

That after the formation of said unlawful conspiracy and in pursuance thereof and to effect the object and [fol. 440] purposes thereof, and while said conspiracy was in force and in effect, the defendants did, among other things, certain acts hereinafter designated as overt acts, as follows:

OVERT ACTS

I

In the early part of the year 1935 the defendant A. L. McCormack had a conference with R. E. O'Malley, who in 1935 was the duly elected, qualified and acting Superintendent of Insurance for the State of Missouri, and was successor defendant to Joseph B. Thompson in all of the suits in equity heretofore described having consecutive docket numbers from 270 to 426, inclusive, in the City of St. Louis, Missouri, in which the said R. E. O'Malley asked the defendant, A. L. McCormack to go to Chicago to interview Charles R. Street, Chairman of the Committee of fire insurance companies, for the purpose of determining if the said Charles R. Street would be willing to discuss the matter of a settlement and compromise of all the suits in equity heretofore described, and consecutively numbered on the docket of said United States District Court from 270 to 426, inclusive, with the said T. J. Pendergast; that within a few days thereafter the defendant A. L. McCormack went to Chicago, interviewed the said Charles R. Street at his office in the Strauss Building on Michigan Boulevard in the said City of Chicago, and was advised by the said Charles R. Street that he would meet the [fol. 441] said T. J. Pendergast to discuss with him the matter of a settlement and compromise of the fire insurance rate litigation and the distribution of impounded funds.

II

That shortly thereafter, at St. Louis, Missouri, the defendant A. L. McCormack told the defendant R. E. O'Malley that the said Charles R. Street would meet the defendant T. J. Pendergast in Chicago for the purpose of attempting to effect a compromise and settlement of the litigation pending as aforesaid.

III

Within a week or two thereafter the defendants T. J. Pendergast and A. L. McCormack met the said Charles R. Street at the Palmer House, a hotel in the City of Chicago, and that at that meeting and conference Mr. Street told Mr. Pendergast that he would be willing to pay a fee in order to get the matters, then in controversy between the fire insurance companies and the State Su-

perintendent of Insurance then pending for a hearing upon the merits before the United States District Court as aforesaid, compromised and settled, and that it was then and there agreed the defendant T. J. Pendergast was to receive a fee of $500,000 if he could get the cases compromised and settled.

IV

That a few weeks thereafter the defendant A. L. McCormack delivered $50,000 in United States currency to T. J. Pendergast at the office of the said T. J. Pendergast at 1908 Main Street in Kansas City, Missouri, the said [fol. 442] $50,000 representing the first installment to be paid upon the fee to be paid by Charles R. Street to T. J. Pendergast, and that the said T. J. Pendergast received and retained the said $50,000.

V

That sometime after the transaction set forth in overt act IV next above, the exact day and date being unknown to the members of this grand jury, the defendant A. L. McCormack received $50,000 in United States currency from Charles R. Street in Chicago, Illinois, and delivered the same to the defendant T. J. Pendergast at his office at 1908 Main Street, Kansas City, Missouri; that the said T. J. Pendergast received the said $50,000, retained $5,000 thereof, returning to the defendant A. L. McCormack the sum of $45,000, and that the defendant A. L. McCormack delivered $22,500 of this to the defendant R. E. O'Malley and retained $22,500 for himself.

VI

That sometime thereafter, the exact day and date being unknown to the members of this grand jury, but being in the year 1935, a conference was held at the Muehlebach Hotel in Kansas City, Missouri, which was attended by Charles R. Street and various attorneys for the insurance companies, and R. E. O'Malley, the State Superintendent of Insurance, and divers other persons, at which a compromise and settlement of the fire insurance rate litigation and the distribution of the monies impounded by order [fol. 443] of this Court was agreed upon, which said agreement was substantially in all particulars the same as is recited in the stipulation hereinbefore referred to

and filed with the United States District Court on the 19th of June, 1935.

VII

That sometime in the early part of the year 1936, the defendant A. L. McCormack received from Charles R. Street in Chicago, Illinois, the sum of $330,000 in United States currency, which he delivered to the defendant T. J. Pendergast at his office at 1908 Main Street in Kansas City, Missouri; that the said T. J. Pendergast retained $250,000 of the said sum of $330,000 and returned to the said defendant A. L. McCormack the sum of $80,000, saying, 'Here is $80,000, give half of it to Emmett' (meaning the defendant R. E. O'Malley), and that the said defendant A. L. McCormack delivered $40,000 to the defendant R. E. O'Malley in St. Louis, Missouri, and retained $40,000 for himself.

VIII

That thereafter on or about the 25th day of October, 1936, Charles R. Street transmitted by bank draft from Chicago, Illinois, to the defendant A. L. McCormack at St. Louis, Missouri, $10,000, which the said defendant A. L. McCormack converted into United States currency and conveyed to Kansas City and delivered to T. J. Pendergast at the Menorah Hospital in Kansas City, Missouri.

[fol. 444]

IX

In the early part of March, 1939, the defendant A. L. McCormack appeared before a United States grand jury sitting at Kansas City, Missouri, for the Western Judicial District of the State of Missouri, to testify before the said United States grand jury concerning the transactions between himself, T. J. Pendergast, R. E. O'Malley, Charles R. Street and any other person or persons unknown to the members of the grand jury, in connection with the compromise and settlement of the litigation hereinbefore described, pending in the United States District Court. The said A. L. McCormack was called on numerous occasions by the United States grand jury sitting at Kansas City in March, 1939, as aforesaid, and between sessions of the grand jury was frequently visited by and frequently visited the defendant R. E. O'Malley, on each of which occasions the defendant R. E. O'Malley requested of and importuned the defendant A. L. McCormack to

refuse to disclose and to conceal from the said United States grand jury all of the fraudulent, corrupt and unlawful transactions between him and the other defendants herein named, and any other person or persons with whom he may have had corrupt, fraudulent and unlawful agreements or negotiations, and not to disclose to the grand jury, to the United States Attorney or any of his Assistants or to any agents of the United States any payment of any money by Charles R. Street to the said A. L. McCormack for delivery to the defendant T. J. Pendergast or [fol. 445] the defendant R. E. O'Malley.

X

That the said A. L. McCormack, so appearing before the United States grand jury sitting in Kansas City, Missouri, as aforesaid, in March of 1939 in his testimony before said grand jury refused time after time to reveal and disclose any of the corrupt, unlawful and fraudulent transactions between himself, Charles R. Street, R. E. O'Malley and T. J. Pendergast, to the United States grand jury, and refused to disclose to said grand jury the payment of any money ~~or monies~~ to any person or persons for the purpose of obtaining or influencing the fraudulent and dishonest settlement and compromise of all the litigation pending before the said United States Court for the Western Judicial District of the State of Missouri; and that by so refusing to reveal and disclose any of the things concerning which the grand jury inquired, but by denying the same said defendant A. L. McCormack committed wilful, deliberate and corrupt perjury and continued and kept in force the conspiracy and agreement which had theretofore been entered into between himself, Charles R. Street, R. E. O'Malley and T. J. Pendergast;

And so the grand jurors aforesaid, upon their oaths aforesaid, do present and charge that T. J. Pendergast, R. E. O'Malley, A. L. McCormack, Charles R. Street and other persons to the grand jurors unknown, at the times and places aforesaid, by the means aforesaid, and in the manner and form aforesaid, did unlawfully, knowingly, [fol. 446] fraudulently, feloniously and corruptly conspire, combine, confederate and agree together to and with each other and divers other persons to the grand jurors unknown to commit an offense against the United States of America, namely, to do acts and things made crimes

against and in violation of the laws of the United States by Section 241 of Title 18 of the United States Code Annotated;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Acting United States Attorney

A TRUE BILL:

Foreman of the grand jury

Exhibit B.

Indictment

In The District Court Of The United States Of America For The Western District Of Missouri Western Division United States of America, Plaintiff, v. T. J. Pendergast, R. E. O'Malley, A. L. McCormack, Defendant. No. 14,937.

[fol. 447] The grand jurors of the United Sates of America, duly and legally chosen, selected, summoned, and drawn from the body of the Western District of Missouri, and duly and legally empanelled, sworn and charged to inquire of and concerning crimes and offenses against the United States of America in the Western District of Missouri, upon their oaths present and charge that T. J. Pendergast, R. E. O'Malley and A. L. McCormack, whose more full and true names are not known to the members of this grand jury and who are hereinafter sometimes referred to as the defendants, together with Charles R. Street and divers other persons whose names are unknown to the grand jurors, at Kansas City, Jackson County, Missouri, within the Western Division of the Western Judicial District of the said State of Missouri, and within the jurisdiction of this court, prior to the commission of the said overt acts hereinafter set forth in this indictment did unlawfully, wilfully, knowingly, feloniously and corruptly combine, conspire, confederate and agree together and with each other and to and with divers other persons whose names are unknown to this grand jury, in violation

of Section 88, Title 18 of the United States Code Annotated, to defraud the United States by interfering, obstructing and impeding and endeavoring to obstruct, interfere with and impede by dishonest means and by fraudulent and corrupt agreements the orderly and lawful functions [fol. 448] of a department of the United States government, to wit, the Judiciary Department thereof, in that they induced and procured and attempted to induce and procure a decree of the court by craft, deceit, dishonesty, fraud and corruption and interfering with the regular and due process of the court by dishonest and fraudulent means;

At all times mentioned in this indictment there were pending in the District Court of the United States of the Western Judicial District of the State of Missouri certain equity cases numbered on the court docket from 270 to 426, inclusive, in which actions various and divers insurance companies were plaintiffs and the State Superintendent of Insurance of the State of Missouri and the Attorney General of the State of Missouri were the defendants, all of said cases having been filed in the said District Court of the United States for the Western Judicial District of Missouri on or about the 25th day of May 1930, in which causes of action the parties plaintiff were seeking to restrain and enjoin the parties defendant from interfering with the demanding, collecting, receiving and retaining of premium charges for fire insurance and windstorm insurance policies written by the parties plaintiff by virtue of any authority vested in the said state officials under the laws of the State of Missouri; that said restraining order had been granted by the District Court of the United States as prayed by the parties plaintiff; that there was a difference in the rates approved by the State Su- [fol. 449] perintendent of Insurance and the rates charged by the insurance companies who were parties plaintiff in the above-mentioned cases of approximately 16-2/3 per cent, the said insurance companies seeking to collect a higher premium charge on windstorm and fire insurance policies than were approved by the State Superintendent of Insurance, and the said District Court of the United States filed an order at or about the same time the restraining order was filed ordering approximately 16-2/3 per cent of the premium charges sought to be collected by the various insurance companies who were parties plaintiff in the above-entitled action to be impounded

and held by a custodian duly appointed by the court pending the decision of said causes upon the merits, and which sum of money so collected on or about the 1st day of February 1936 amounted to more than $8,000,000.00; that it was the object and purpose of the conspiracy and of the said defendants and each and all of them that they, T. J. Pendergast, R. E. O'Malley, A. L. McCormack and Charles R. Street, would and did obtain from the various insurance companies who were parties plaintiff in the causes pending as aforesaid before the United States District Court as aforesaid, and that they would and did, after having obtained the said large sum of money, divide the same between the defendants, T. J. Pendergast, R. E. O'Malley and A. L. McCormack, and that they would and did thereafter endeavor to influence the said various insurance companies parties plaintiff in suits pending as aforesaid to [fol. 450] agree and accede to a certain stipulation and compromise and settlement of the issues in controversy in said causes pending in the United States Court as aforesaid, and that they would and did pay a certain portion of the said sum of money so collected as aforesaid, from the various insurance companies parties plaintiff in the suits pending as aforesaid to the State Superintendent of Insurance to influence corruptly the said State Superintendent of Insurance to agree and accede to said compromise and settlement stipulation, and that they would and did pay to the defendant T. J. Pendergast the greater portion of the said sum of money collected as aforesaid from the insurance companies for the purpose of buying the political influence of the said T. J. Pendergast; that they, the defendants, and each of them thereafter would and did, after having influenced the various insurance companies parties plaintiff in suits pending as aforesaid, and the defendant R. E. O'Malley, State Superintendent of Insurance, to agree and accede to the compromise, settlement and stipulation hereinbefore referred to, prevail upon the parties plaintiff to submit a motion for a decree to the said United States Court before whom all of the said causes hereinbefore described were pending in accordance with and embodying the substance of the compromise, settlement and stipulation theretofore corruptly agreed upon and entered into; that they, the defendants, and each and all of them would and did thereafter, by the fraudulent and corrupt means aforesaid, prevail upon the said United States Court before whom all the suits described

[fol. 451] hereinbefore were pending to file its decree in accordance with and embodying the substance of the compromise and settlement corruptly agreed upon and entered into, which said decree was not a free and unhampered decree of the court regularly arrived at in the due administration of justice either by a compromise and settlement of the issues of said law suits by the parties thereto or after a hearing upon the merits thereof; and that they, the said defendants, and each and all of them, the said T. J. Pendergast, R. E. O'Malley and A. L. McCormack, would and did keep secret all of the fraudulent and corrupt plans, negotiations and agreements hereinbefore described and would and did prevent the said United States District Court from discovering the fraudulent and corrupt means employed by which the said decree of the said United States District Court was obtained as aforesaid, and that they would and did endeavor to conceal all of the corrupt and fraudulent agreements made by them hereinbefore described until after all of said causes were finally determined and completely disposed of by the said United States District Court as aforesaid;

That after the formation of said unlawful conspiracy and in pursuance thereof and to effect the object and purposes thereof and while said conspiracy was in force and effect, the defendants did, among other things, certain acts herein designated as overt acts, as follows:

[fol. 452] OVERT ACTS

I

In the early part of the year 1935 at St. Louis, Missouri, A. L. McCormack was requested by R. E. O'Malley to interview Charles R. Street, Chairman of the committee for the insurance companies, for the purpose of determining if the said Charles R. Street would be willing to discuss the matter of a settlement and compromise between the insurance companies upon the one hand and the Superintendent of Insurance for the State of Missouri upon the other in all of the cases pending before the United States District Court for the Western Judicial District of the State of Missouri, as aforesaid.

II

That sometime thereafter and in the year 1935 the said A. L. McCormack arranged an interview to be held

at the Palmer House Hotel in Chicago between himself, T. J. Pendergast and Charles R. Street at which conference it was agreed by and between them that Charles R. Street would procure and pay to T. J. Pendergast the sum of $500,000 for the purpose of effecting a compromise and settlement of the litigation then pending before the United States District Court for the Western Judicial District of Missouri, as aforesaid.

III

That thereafter and still in the year 1935, the exact day and date being unknown to the members of this grand jury, Charles R. Street paid $50,000 of United States cur- [fol. 453] rency to A. L. McCormack, who delivered the same to T. J. Pendergast at the office of the said T. J. Pendergast at 1908 Main Street in Kansas City, Missouri, which $50,000 was received and retained by the said T. J. Pendergast.

IV

That sometime after the transaction set forth in Overt Act III, the exact day and date being unknown to the members of the grand jury, the defendant A. L. McCormack delivered $50,000 in United States currency received by him from Charles R. Street to T. J. Pendergast, at the latter's office at 1908 Main Street, $5,000 of which was retained by the said T. J. Pendergast, $22,500 was retained by the defendant A. L. McCormack, and $22,500 of which was paid to the defendant R. E. O'Malley.

V

That thereafter, the exact day and date being unknown to the members of the grand jury, but still in the year 1935, the defendant Charles R. Street and the defendant R. E. O'Malley reached a compromise and settlement of all the litigation pending as aforesaid before the United States District Court for the Western Judicial District of Missouri which was transcribed into written form.

VI

That sometime in the early part of the year 1936, the exact day and date being unknown to the members of the Grand Jury, defendant A. L. McCormack received from [fol. 454] the defendant Charles R. Street in Chicago,

Illinois, the sum of $330,000.00 in United States Currency which he delivered to the defendant T. J. Pendergast at the office of the said T. J. Pendergast at 1908 Main Street, Kansas City, Missouri, and that the said T. J. Pendergast received and retained $250,000.00 of the said sum of $330,000.00; that $40,000.00 of said sum was retained by the defendant A. L. McCormack and that $40,000.00 of said sum was paid to the defendant R. E. O'Malley, the payment to the last named defendant being made at St. Louis, Missouri.

VII

That about October, 1936, the defendant Charles R. Street transmitted by bank draft $10,000.00 to the defendant A. L. McCormack at St. Louis, Missouri. That said sum of $10,000.00 the said defendant A. L. McCormack conveyed to Kansas City, Missouri and delivered the same at Menorah Hospital in said City and State to the said defendant T. J. Pendergast and that the said defendant T. J. Pendergast received and retained the same.

VIII

That in March of 1939, defendant A. L. McCormack was subpoenaed to appear before the United States Grand Jury sitting at Kansas City, Missouri, for the purpose of testifying as to all of the transactions between him and the defendant Pendergast and the defendant O'Malley in connection with the compromise and settlement of the litiga- [fol. 455] tion pending before the United States District Court for the Western Judicial District for the State of Missouri as hereinbefore set forth; that the said A. L. McCormack was called before the United States Grand Jury sitting at Kansas City, Missouri for the Western Judicial District of the State of Missouri on numerous occasions and from day to day and at first denied all of the fraudulent, corrupt transactions, agreements and negotiations hereinbefore set forth between himself, Charles R. Street, R. E. O'Malley and T. J. Pendergast. That between the sessions of the United States Grand Jury sitting at Kansas City as aforesaid, the defendant A. L. McCormack frequently visited and was frequently visited by the defendant R. E. O'Malley who requested of the said A. L. McCormack that he conceal and refuse to disclose to the United States Grand Jury sitting as aforesaid to the United States Attorney and his assistants conducting the

investigation before the said United States Grand Jury, and to the agents of the Government of the United States, any of the corrupt transactions, agreements and negotiations between the defendants and all of them and that he requested and importuned the said A. L. McCormack not to reveal the fact that any money had been paid to anyone for the purpose of corruptly influencing the decree of the court as hereinbefore described.

IX

In March, 1939, the exact day and date being unknown [fol. 456] to the members of this Grand Jury, the said A. L. McCormack committed willful, deliverate and corrupt perjury before the United States Grand Jury sitting as aforesaid and refused to reveal any payment of money for the purpose of corrupting and influencing the State Superintendent of Insurance in agreeing to a settlement and compromise of the litigation pending before the United States District Court for the Western Judicial District of Missouri as aforesaid, and for obtaining a decree of the Court not promulgated in a regular, orderly and honest manner and refused to reveal to the United States Grand Jury, to the United States Attorney and to his assistants and to the agents of the United States any of the corrupt, fraudulent and unlawful transactions, agreements and negotiations between himself, Charles R. Street, R. E. O'Malley and T. J. Pendergast.

So the grand jurors aforesaid upon their oaths aforesaid do present and charges that T. J. Pendergast, R. E. O'Malley, A. L. McCormack and Charles R. Street and other persons to the grand jurors unknown, at the times and places aforesaid, by the means aforesaid and in the manner and form aforesaid did unlawfully, knowingly, fraudulently, feloniously and corruptly conspire, combine, confederate and agree together to and with each other and divers other persons to the grand jurors unknown to defraud the United States of America by interfering with, impeding and endeavoring to obstruct the orderly and lawful functioning of a department of the Government, to-wit the Judiciary Department.

[fol. 457] Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Acting United States Attorney

A TRUE BILL:

Foreman of the Grand Jury"

(Which said MOTION OF DEFENDANT ROBERT EMMETT O'MALLEY TO ABATE AND QUASH INFORMATION AND WITHDRAW RULE TO SHOW CAUSE was endorsed by the Clerk of the Court as follows:)

"FILED AUG 31 1940 A. L. ARNOLD, Clerk, By Edna D. Morris Deputy"

AND thereafter, and on Saturday, the 12th day of October, 1940, MOTIONS TO ABATE AND QUASH INFORMATION AND WITHDRAW RULE TO SHOW CAUSE on behalf of each of the defendants were argued, submitted and taken under advisement.

AND thereafter, and on Thursday, the 14th day of November, 1940, the Court overruled defendants' MOTIONS TO ABATE AND QUASH INFORMATION AND WITHDRAW RULE TO SHOW CAUSE, which said Order of the Court overruling said motions is in words and figures as follows:

[fol. 458] (Order Overruling Motions of Defendants to Abate and Quash Information and Withdraw Rule to Show Cause.)

"In the District Court of the United States for the Western District of Missouri United States of America, Plaintiff, -vs- Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, Defendants. Before Judges Kimbrough Stone Albert L. Reeves Merrill E. Otis. No. 5040 A proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

The several motions of Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack to abate and quash

the information charging contempt of this court, and to withdraw the rule heretofore issued to show cause, having been duly considered by the Court and the Court being fully advised in the premises, are by the Court overruled for the reasons set out in the opinion of the Court this day filed. SO ORDERED.

It is further ordered that the defendants file answers to the information on or before the 14th day of December, 1940.

Kimbrough Stone
Circuit Judge
Albert L. Reeves
District Judge
Merrill E. Otis
District Judge"

[fol. 459] (Which said Order of the Court was endorsed by the Clerk of the Court as follows:)

"FILED NOV 14 1940 A. L. ARNOLD, Clerk By H. C. Spaulding Deputy"

AND thereafter, and on Monday, the 18th day of November, 1940, the Court filed its ORDER ALLOWING EXCEPTIONS to the overruling of Defendants' Motion to Abate and Quash Information and Withdraw Rule to Show Cause, which said ORDER ALLOWING EXCEPTIONS is in words and figures as follows:

(Order Allowing Exceptions to Defendants to Overruling of Motions of Defendants to Abate and Quash Information and Withdraw Rule to Show Cause.)

"In the District Court of the United States for the Western District of Missouri United States of America, Plaintiff, -vs- Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, Defendants. No. 5040 A proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

To the order filed herein on November 14, 1940, in which order the several motions of the defendants to abate and quash the information and withdraw the rule to show

cause were overruled, the defendants, and each of them, are allowed exceptions. SO ORDERED.

[fol. 460] Kimbrough Stone
Circuit Judge
Albert L. Reeves
District Judge
Merrill E. Otis
District Judge"

(Which said ORDER ALLOWING EXCEPTIONS was endorsed by the Clerk of the Court as follows:)

"FILED NOV 18 1940 A. L. ARNOLD, Clerk by H. C. Spaulding Deputy"

[fol. 461] In the District Court of the United States for the Western District of Missouri Central Division United States of America, Plaintiff, -vs- T. J. Pendergast, R. E. O'Malley, and A. L. McCormack, Defendants. No. 5040 a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive.

BE IT REMEMBERED, that on Monday, April 14, 1941, the above entitled cause came on regularly for hearing before the Honorables KIMBROUGH STONE, ALBERT L. REEVES and MERRILL E. OTIS, sitting as a statutory Three Judge Court.

The Plaintiff was represented by Messrs. Richard K. Phelps and Charles F. Lamkin, Jr., Assistant United States Attorneys.

The Defendant, T. J. Pendergast, was present in person and represented by Messrs. R. R. Brewster and John G. Madden, his attorneys.

The Defendant, R. E. O'Malley, was present in person and represented by Messrs. Terence M. O'Brien and Ralph M. Russell, his attorneys.

The Defendant, A. L. McCormack, was present in person and represented by Mr. Forest W. Hanna, his attorney. [fol. 462] Whereupon, the following proceedings were had and entered of record, to-wit:

Judge Stone: In this matter of the case of The United States against Thomas J. Pendergast, Robert Emmet O'Malley and A. L. McCormack, are the parties ready?

Mr. Phelps: The Government is ready, your Honor.

Mr. Brewster: The defendants are ready, your Honor.

Judge Stone: It might be of aid to the Court if you gentlemen desire to do so for you before the case is opened in the sense of testimony, to make an opening statement concerning the issues. We should like to have all of the statements, if they are made at all, made at the beginning so that we can have the matters in mind.

Now, for your information, the hours of the court will be from ten until 12:30 and from 1:45 to 5:00 o'clock.

Do you care to make any statement, Mr. Phelps?

Mr. Phelps: If the Court please, this case which has the number 5,040 is one in which the three defendants, T. J. Pendergast, Robert Emmet O'Malley and A. L. McCormack, are ordered by the Court in pursuance to an information which was filed in this Court on the 13th of July, 1940, to show cause why they should not be held as in contempt of court.

As to a statement as to the Government's position in this case, the evidence offered on behalf of the Government -- and I may say in this connection that since this action is in the nature of a criminal proceeding, that I take it the burden of proof is upon the Government, and it [fol. 463] must establish the contemptuous conduct of these defendants by such evidence as is competent, relative and material, and would be so held in any other kind of criminal case.

Now, our evidence will consist in this case very largely in reference to records of the proceedings of this court. Counsel upon the other side very kindly on last Saturday morning offered to stipulate to all these things which are matters of record in this court, which will save a great deal of the Court's time in this case. In connection with that stipulation also, we would like to ask the Court to judicially notice all matters of record of its own proceedings in this case out of which the contempt action grows. To that end, we shall stipulate, with the consent of counsel on the other side, and it was counsel's own suggestion, I may say, that we stipulate, that there was on the 25th day of May, or about the 25th of May, 1930, filed in the

United States District Court for the Central Division of the Western Judicial District of Missouri a bill in equity on behalf of the American Insurance Company, a corporation, against Joseph B. Thompson, Superintendent of Insurance for the State of Missouri and Stratton Shartel, who was Attorney General at that time for the State of Missouri; that this bill in equity bore the docket number 270, and that there was alleged therein, among other things, that the defendant, the Superintendent of Insurance, Mr. Joseph B. Thompson, had failed and neglected to approve the rates of insurance being charged by the [fol. 464] plaintiff for fire and wind storm insurance according to a notice filed with the said State Superintendent of Insurance on or about the 30th of December, 1929, and that he had refused to make any order approving said rates so charged by the plaintiff according to said notice, and that the said Superintendent of Insurance asserted a lack of power in the plaintiff, the American Insurance Company, to collect such rates without the approval of the Superintendent of Insurance. That this attitude on the part of the State Superintendent of Insurance was designed to lessen and destroy the value of the plaintiff's established business in Missouri. That under the authority of certain designated statutes of the State of Missouri, the State Superintendent would take action against the plaintiff insurance company, which would operate to deprive the plaintiff of its rights of property and liberty of contract without due process of law, and would deny to the plaintiff the equal protection of law in derogation of Section 1 of the 14th amendment of the Constitution of the United States. That the plaintiff had no plain, adequate or complete remedy at law, and that no relief could be [aforded] to it, except in a United States Court of Equity, and the petition concluded with the prayer that the said defendants, and each of them, be restrained and enjoined from invoking the powers conferred upon them by the statutes of Missouri referred to in the petition or bill in equity, and that they be restrained and enjoined from any interference of any kind with the plaintiff in [fol. 465] demanding, collecting, receiving and retaining the premium charges upon fire insurance and wind storm insurance at the rates created and made by the aforesaid filing of December 30, 1929, and from refusing to renew the license of the plaintiff, or any of its agents or representatives, or withholding such licensing.

Next, that thereafter, on or about the 2nd of July, 1932, a District Court of the United States for the Western District of Missouri made up of the Honorable Kimbrough Stone, Circuit Judge, Honorable Albert L. Reeves and the Honorable Merrill E. Otis, District Judges, of and for the Western District of Missouri, promulgated an order and filed the same, enjoining and restraining the defendants and each of them, their attorneys, solicitors, deputies and agents, and all person claiming or assuming to act foror under them, as prayed in the plaintiff's bill of equity in case No. 270.

Third, that contemporaneously with the filing of the bill in equity aforesaid by the plaintiff, American Insurance Company, there was filed in said Court similar bills of equity on behalf of other insurance companies praying for the same relief against the same defendants upon the same grounds as asserted in the bill in equity No. 270, and that the additional bills in equity so filed bore the consecutive docket numbers from 271 to 426, both inclusive.

Fourth, that the same restraining order and the same [fol. 466] interlocutory injunctions were promulgated and filed by the District Court made up as I have sated heretofore, in each of the cases from 270 to 426, both inclusive. I mean to say that the same interlocutory injunction or restraining order was filed in the equity cases numbered 271 to 426, both inclusive, as were filed in the case bearing the docket number 270 in which the American Insurance Company was the plaintiff and Joseph B. Thompson and Stratton Shartel, respectively Superintendent of Insurance and Attorney General of the State of Missouri were the defendants.

That thereafter, very shortly thereafter -- I mean after the restraining orders and interlocutory injunction orders were filed in the United States District Court, an order was promulgated by the said District Court providing for the appointment of a custodian to receive 16 2/3% approximately of all premiums charged on fire insurance and windstorm insurance collected by the said plaintiff, which under the orders of the Court filed in said cause was to be impounded under a custodian appointed by the Court pending the determination of the merits in said Court.

That sometime thereafter by an order of the Court duly made and promulgated, Mr. Walter S. McLucas -- I believe an officer in the Commerce Trust Company of Kansas City, Missouri -- was appointed as custodian of the impounded fund, took the required oath, qualified and acted for a time as such custodian; that later on he resigned as such custodian and that William T. Kemper of the Commerce [fol. 467] Trust Company, was appointed to succeed him as successor custodian; that he took the oath, qualified and acted until his death as such custodian of such fund; and that upon the death of William T. Kemper, William T. Kemper, Jr., of the Commerce Trust Company, was appointed and qualified and acted as custodian of the impounded fund.

That after that the District Court made an order appointing a Special Master to take testimony and to make a report to the Court of his findings and conclusions.

That these restraining orders and interlocutory injunctions and said order impounding 16 2/3% of the premium rates collected as I have stated heretofore in this statement continued in full force and effect until the 1st of February, 1936.

That on or about the 18th day of June, 1935, a stipulation was made between the parties to this litigation, and I may say that the evidence will be that as to the parties defendant in this litigation on these bills in equity filed as I have described, there were successor defendants, that the succeeding State Attorney General and the succeeding State Superintendent of Insurance became parties defendant. That in the year 1935 one of the defendants in this case, Robert Emmet O'Malley was the elected, qualified and acting Superintendent of Insurance for the State of Missouri, and that Roy McKittrick was the elected, qualified and acting Attorney General of the State of Missouri. That sometime in the early part of June, 1935, the stipulation was entered into for the settlement of in- [fol. 468] surance rates between the parties in these cases, which stipulation was filed in the United States District Court for the Western District of Missouri, made up of the three judges whom I have heretofore mentioned. That about the same time that this stipulation was filed, a motion for a decree was filed on behalf of the defendants in this case, and that this motion for decree stated to this Court that a compromise and settlement upon all matters

and controversies between the various plaintiff insurance companies and the State Superintendent of Insurance had been reached, and in which said motion for decree the plaintiff prayed for an order of the Court to return to the policyholders and the insurance companies the moneys impounded by order of the Court in accordance with the stipulation made and entered into between the plaintiff, attorneys for the plaintiff, and the attorneys for the defendant, which said stipulation was filed of record in the United States District Court for the Western District of Missouri on the 19th day of June, 1935.

Our evidence will be that this stipulation compromised and settled all of the issues and controversies between the plaintiff insurance companies and the defendant, Superintendent of Insurance for the State of Missouri, in all of the cases having docket numbers 270 to 426, both inclusive.

Our evidence will be that on the 1st day of February, 1936, the United States District Court for the Western District of Missouri, consisting of the judges whom I have [fol. 469] named heretofore, made a decree, filed the same as prayed for in the plaintiffs' motion for decree filed on the 18th of June, 1935, in which decree the Court directed the distribution of the impounded funds which amounted, I think, to approximately $8,000,000.00, in accordance with the stipulation made and entered into between the attorneys for the fire insurance companies and the attorneys for the defendant, State Superintendent of Insurance, but retaining jurisdiction to make orders respecting the obligations of the parties for the payment thereof, and to make further orders in aid of distribution of the impounded moneys and retaining jurisdiction over all persons or parties affected by its decrees for all purpose of effectuating the said decree.

Now, after that time, sometime in the year 1940, I think in April, 1940, this Court made an order of restitution -- I should say before I say that, that in conformity with the decree of the Court promulgated the first of February, 1936, that the impounded moneys were paid out in a manner provided for by the stipulation, or in the manner approximating that provided for in the stipulation, and that by the terms of that order, the money was paid out in the ratio I think of about 20% to the policyholders and 80% to the insurance companies, with the understanding that out of that 80% attorneys' fees, costs and agents'

premiums, etc., would be paid by the insurance companies.

[fol. 470] After the money had been paid out in August, 1940, this Court made an order of restitution ordering the insurance companies to return to the registry of the court the impounded moneys which had been paid out to the insurance companies under the decree of the first of February, 1936. The Court at that time made certain findings of fact, the same date, and promulgated its decree in accordance with the order of restitution on the 14th of August, 1940, and in that decree awarded the entire amount of the moneys impounded to be returned to the policyholders, and I think Saturday this Court handed down an order (that would be the 12th of April of 1941), denying the motion for rehearing upon the decree heretofore issued.

I mention all of these matters first to the Court because they are all matters of record. They are the records of the proceedings of this Court.

Now, other evidence will be offered by the Government to show that after the decree or while this matter was pending in the Court and before its determination, while it was under consideration by the Court, that one of the defendants, A. L. McCormack, sometime in the year 1935 had an interview with a Mr. Charles R. Street who was Chairman of the Committee of the Insurance Companies for the Western Department of the United States, which included practically all of that part of the United States west of the Mississippi River; that this meeting between the defendant McCormack and Street was held in Chicago in the office of Street in the Strauss Building on Michigan [fol. 471] Boulevard in that city; that McCormack inquired of Street if he desired to settle the insurance litigation, was informed that he did desire to do so, and McCormack inquired if he would be willing to have an interview with another of the defendants, Mr. T. J. Pendergast, for the purpose of trying to work out a settlement and compromise. Mr. Street told Mr. McCormack that he would be glad to see Mr. Pendergast in connection with this compromise. That sometime shortly after the date of this conversation between Mr. Street and Mr. McCormack, Mr. T. J. Pendergast and Mr. A. L. McCormack and Mr. Charles R. Street held a conference or meeting at the Palmer House in Chicago, Illinois, and in that con-

versation Charles R. Street advised the defendant, Mr. Pendergast, that he would be willing to pay a substantial fee for a settlement and compromise of the matters in controversy in the insurance rate litigation; that that was first fixed at $500,000; later because of the fact there were cases involved in the state court, that amount was raised to $750,000. That a short time after the meeting, Mr. Street delivered to Mr. A. L. McCormack $50,000 in currency of the United States, which Mr. McCormack carried to Kansas City, Missouri, and delivered to Mr. T. J. Pendergast at his office at 1908 Main Street in Kansas City, Missouri, and that this $50,000 represented the first installment of the payment of the fee that Mr. Pendergast was to receive for assisting in effecting a settlement and compromise of the fire and windstorm rate litigation in the State of Missouri.

[fol. 472] The evidence will be that the defendant, T. J. Pendergast retained all of the $50,000 carried to him on this occasion by the defendant, McCormack.

The evidence will show that a short time after that another installment of $50,000 more was paid, was carried in much the same manner by the defendant, McCormack, to the defendant, Pendergast, and that of that $50,000, the defendant, T. J. Pendergast retained $5,000 and gave $45,000 back to McCormack with the instructions to divide that equally between them, McCormack, and the defendant, R. E. O'Malley, and that McCormack did that, carrying the $45,000 to St. Louis, Missouri, where he divided it equally, $22,500 for himself, and the same amount for Mr. O'Malley.

The evidence for the Government will show that thereafter Mr. Street delivered to Mr. McCormack -- this was in the early part of the year of 1936 -- and I think shortly after the decree of this Court was promulgated, the first of February, 1936 -- that Mr. Street delivered to Mr. McCormack $330,000 in currency of the United States which the defendant, McCormack, placed in a suit case and carried from Chicago, Illinois, to Kansas City, Missouri, and delivered to the defendant, Mr. T. J. Pendergast, and that of that $330,000, the defendant, Pendergast, retained $250,000 and again gave back to the defendant, McCormack, the sum of $80,000. This transaction took place at the home of the defendant, Pendergast, in Kansas City, Missouri. The defendant, Mr. McCormack, then took

[fol. 473] this money, $80,000 which had been so delivered to him, to St. Louis and there divided it equally between himself and the defendant, R. E. O'Malley.

The evidence will further be that in October, about the 25th of October, 1936, the defendant, McCormack, again carried from St. Louis, this time to Kansas City, Missouri, the sum of $10,000 which he had received in the form of a cashier's check or bank draft from Mr. Street for the defendant, T. J. Pendergast, and that the last payment of this $10,000 which was the last payment ever made, was delivered to the defendant, Mr. T. J. Pendergast, by the defendant, A. L. McCormack, at the Menorah Hospital in Kansas City, Missouri, where the defendant, T. J. Pendergast was then a patient.

The Government's evidence will show that the purpose for which this money was paid was for making a settlement and compromise of the Missouri fire and windstorm insurance rate litigation; that after the money had been passed, after an agreement had been reached between the Superintendent of Insurance and the representatives of the plaintiffs, insurance companies, in a conference held in the Muehlebach Hotel in Kansas City, Missouri, for that purpose, this money was paid to the extent of $440,000, and that after its payment the plaintiffs then in pursuance of the compromise reached at the conference I have mentioned at the Muehlebach Hotel and the defendants entered into the stipulation which was filed on or about the 19th day of June, 1935, in this court, and that [fol. 474] the motion for decree was filed on behalf of the plaintiffs after the compromise had been agreed upon and after the money had been paid for the purpose of procuring such a settlement, and that, thereafter, it is the contention of the Government, that the decree so promulgated by this Court on the 1st of February, 1936, was induced by corruption, by fraud, and that it was an interference with the regular and proper exercise of the judicial functions of this court; that it amounted to an obstruction of justice and as such was an interference with the regular and proper exercise of the judicial powers of this Court, and as an obstruction of the processes of justice, the actions of each of the defendants are contemptuous and that the defendants should be held as in contempt of the Court.

It is further contended by the Government that the offenses here committed is in the nature of a continuing of-

fense and that the offense continued until the obstruction to the regular and orderly functioning of the Court was removed and that was not removed because of the fact that the secret understandings, the agreements between the parties which had been accomplished by the bribery of a state official, by corruption, and fraud was concealed from the Court and the Court was prevented by affirmative actions on the part of the defendants, particularly by the defendant, A. L. McCormack, as shown in his testimony before a United States grand jury in April, 1939, from learning that the decree so obtained the first of February, 1936, was fraudulently and unlawfully obtained, and that it was a contemptuous interference with the [fol. 475] proper functioning of the judicial powers of this Court and that it was an obstruction of justice. It is the Government's contention that that offense continued until the true facts in the case were known and the Court was then enabled to make an untrammeled and uninterfered with finding of fact and a decree which it did in August, 1940.

Of course, if the evidence sustains the facts which I have outlined in this brief statement to the Court, we expect the Court to find the defendants, and each of them, in contempt of the Court and to assess such punishment as the Court in its discretion may deem just and proper.

Judge Stone: Mr. Phelps, I am not quite clear on one matter. I understood you to say at the beginning of your statement that some sort of a stipulation as to at least some facts had been reached in this immediate proceeding.

Mr. Phelps: That is correct, your Honor.

Judge Stone: Has that stipulation been reduced to writing?

Mr. Phelps: There has been no prepared stipulation but it was agreed between counsel Saturday that all matters of record would be stipulated.

Judge Stone: That is, if I understood you, your conception of the stipulation or agreement of counsel which may take such form of admission as they see fit here now, as to the existence, I may say, of all matters except the actions which you have outlined concerning the so-called bribery transactions?

[fol. 476] Mr. Phelps: That is correct, your Honor.

Judge Stone: That is as to the issue of fact -- I am not speaking of law?

Mr. Phelps: That is right.

Judge Stone: But the issue of fact is simply and solely as to those transactions?

Mr. Phelps: Yes, sir.

Judge Stone: Is that your understanding, gentlemen?

Mr. Madden: Not [precicely]. It seems to me, at least, and I think I suggested this to Mr. Phelps that to merely stipulate for the Court to take judicial notice of all matters [occuring] in the insurance rate litigation would leave a record which would be so indefinite and vague as to almost preclude review, if such review were necessary. I suggested to Mr. Phelps, and it was my understanding of the proposed stipulation, that we would waive identification of the various matters in the insurance rate litigation, but that specific exhibits should be offered under that stipulation and received in evidence. I had in mind, for example, that to avoid encumbering the record, one typical original bill in equity in the rate litigation should be received in evidence coupled with the stipulation that there were a number of others of identical or similar import. That thereupon a typical amended or supplemental bill should be received in evidence coupled with a similar stipulation, to the end that there should be in this record as exhibits the typical pleas upon which the [fol. 477] insurance rate litigation proceeded. I then suggested that -- again waiving identification -- that these other documents such as the agreement of compromise, the stipulation of compromise, the motion for a decree and the decree should be marked and received. My thought, of course, is that we should have a record in this proceeding which is clear and definite and gives a proper picture of the proceedings taken in the insurance rate litigation because there are a number of legal questions which will be raised by the defense in connection with that rate litigation.

Judge Stone: Well, do you think, Mr. Madden, that while you might stipulate as to the form, that that would have any control on the court in taking judicial notice of every matter of rate and thing that has taken place in this Court?

Mr. Madden: Of course, I do not conceive the right of this Court in this criminal proceeding to take judicial notice of matters of record in what we regard as another and an independent equity proceeding. I suggested this

other form of procedure for the reason that the clerk informs me that the records in that insurance rate litigation are so voluminous that it would be almost impossible to know the record upon which we are proceeding under any general stipulation as to accepting any of those records as being in evidence for all purposes in this case.

Mr. Phelps: I understood from counsel Saturday that [fol. 478] all matters of record in this proceeding -- all matters of the records of this court would be stipulated. Is that not correct?

Mr. Madden: Would be stipulated, identification waived, but would be received as part of the record in this case; in other words, take your first bill in equity there, that that should be received in evidence coupled with a stipulation that there were some 135 other bills of identical character.

Judge Stone: It seems to me you gentlemen are very far apart on your understanding of what that arrangement is. Mr. Phelps understands that it covers the matters of record, and therefore if his understanding is correct, would avoid the introduction of any matters of record.

Mr. Madden: I think Mr. Phelps will agree that I mentioned specifically --

Judge Stone: Your understanding is that all you are waiving or all you are consenting to is avoidance of any trouble of identification of any pleadings or orders or what not in the rate controversy and to the introduction of a typical one in each case?

Mr. Madden: Coupled with a stipulation as to the substantial identity of the other bills or the other record proceedings. I think Mr. Phelps will recall that I mentioned specifically that for the purposes of this record I did want those typical pleadings marked as exhibits.

Mr. Phelps: You mean one of the original bills?

[fol. 479] Mr. Madden: Yes.

Mr. Phelps: But nothing else? I certainly didn't understand that we were to get any other pleading or any other order made by this Court. I thought it was clearly understood because it was stated several times, that all things which were matters of record would be stipulated. I don't see any reason why they couldn't be without encumbering the record with a lot of exhibits.

Mr. O'Brien: May it please your Honors, the defendant, O'Malley, did not participate in the discussions to

which Mr. Phelps and Mr. Madden have referred. We have made no stipulation of any character. I am willing to stipulate upon the basis which Mr. Madden just now suggested however.

Mr. Hanna: Of course, on behalf of the defendant, McCormack, there has been no stipulation of any kind. We will join in the same type of a stipulation suggested by Mr. Madden.

Mr. Madden: If the Court please, you can see my difficulty with a general stipulation which does not contemplate the exception of these particular record matters, the evidence in this proceeding, if there came a question of a review.

Judge Stone: Mr. Madden, pardon me for interrupting you. The only thing that I had in mind in raising this matter with Mr. Phelps was that from his statement it seemed to me that there were some things, as he stated, which had been agreed to by the parties and others as to which he would introduce evidence, and as no written [fol. 480] statement had been given me of that understanding, I wanted to know very clearly at the start what was covered by any agreement and have that agreed to in open court and made part of the record so that the court then would know what were the issues to be covered by the evidence.

Mr. Madden: Let me suggest this, if the Court will permit me. I regret that there is some confusion arisen here as to the stipulation, and perhaps it would have been desirable if Mr. Phelps and Mr. Brewster and I had put that stipulation into written form to avoid any misunderstanding. I believe, however, that if the Court would permit the counsel to confer for a very brief interval we can work out something which will be mutually satisfactory and which will eliminate all of this record proof.

Mr. Phelps: I am satisfied that we will be able to get together on an agreement which would save more time of the Court than we would use in such conference. Counsel has suggested it.

Judge Stone: Well, the Court will recess until two o'clock to give you gentlemen an opportunity to see what you can do and we should like to have the participation in some form of counsel for all of the three parties, and if you find that you need a greater time than that to work out the matter than two o'clock, if you will inform

the judges by half past one, then we can give you such further time as you need, but let us get in a definite [fol. 481] form for the record just what we are doing.

The Court will recess until two o'clock.

Whereupon, the Court stood at noon recess.

[fol. 482] AFTERNOON SESSION, MONDAY, APRIL 14, 1941

Pursuant to adjournment adjournment as aforesaid, at two o'clock p.m. of said Monday, April 14, 1941, the Court met, present and presiding as before, and the trial proceeded as follows:

Judge Stone: Have you gentlemen agreed upon a stipulation as to any of the facts in this matter?

Mr. Phelps: Yes, your Honors.

Mr. Madden: It is just being executed. I might pass up to the Court copies of the stipulation, because I think the stipulation is such that it will necessitate the approval of the Court, because it also has some reference to exceptions.

Judge Stone: It has what, Mr. Madden?

Mr. Madden: It has reference to exceptions to be allowed.

(Said copies of the stipulation were handed to the Court.)

Mr. Madden: Show the filing of that stipulation.

The Clerk: Yes, sir.

Judge Stone: Has this been executed now, Mr. Madden?

Mr. Madden: Yes.

Judge Stone: This stipulation, Mr. Phelps, as to the contents of the record seems to stop with the decree of February 1, 1936:

Mr. Phelps: Yes, sir.

[fol. 483] Judge Stone: Is the Court to assume that you will offer matters occurring later than that date, other than matters of record?

Mr. Phelps: Yes, sir.

Judge Stone: The stipulation will be accepted as covering the matters set forth in it.

Mr. Madden: By that I assume your Honor means that the Court does approve the stipulation with particular reference to the matter of exceptions?

Judge Stone: Certainly. I assume, Mr. Madden, that if in the progress of the hearing other matters of record should appear to be necessary that this stipulation is not exclusive, but simply applies to the matters which are set forth; that either or any party can introduce, if he finds in the course of the trial in taking the direction he thinks advisable, any other matter of record that he thinks advisable?

Mr. Madden: It is my understanding, and I am sure Mr. Phelps' understanding, that this stipulation is not intended to limit anybody. The only purpose of it is to eliminate the necessity of certain record proof which might have been difficult to have had here today, and to curtail so far as possible this record proof which would merely encumber the record.

Mr. Phelps: To try to save time.

Judge Stone: Mr. Clerk, here is the original which is [fol. 484] signed. We have copies here for our own use.

(Which said stipulation, so filed and offered in evidence, is in words and figures as follows:)

(Stipulation As to Certain Pleadings, Records, etc., in So-Called Insurance Rate Litigation.)

"In the District Court of the United States of America for the Central Division of the Western District of Missouri. United States of America, Plaintiff, vs Thomas J. Pendergast, Robert Emmett O'Malley, and A. L. McCormack, Defendants.

BEFORE JUDGES KIMBROUGH STONE ALBERT L. REEVES MERRILL E. OTIS

It is stipulated, by the parties hereto, (both for the purposes of this proceeding before this Court and also for all purposes of appellate review thereof) that the following pleadings, records, orders and entries, together with the filing dates thereof, in the so-called insurance rate litigation, shall be considered in evidence in this proceeding with the same force and effect as if identified,

marked as exhibits, offered by the plaintiff, and received by the Court:

1. The Bill in Equity entitled "American Insurance Company, Plaintiff, vs Joseph B. Thompson, Superintendent of Insurance of the State of Missouri, et al., No. 270, in the District Court of the United States for the Central Division of the Western District of Missouri.

2. The order convening the three-Judge Court in cause No. 270 aforesaid.

[fol. 485] 3. The Amended Bill in cause No. 270 aforesaid.

4. The Supplemental Bill in cause No. 270 aforesaid.

5. The Interlocutory Injunction issued in cause No. 270 aforesaid.

6. The Orders appointing a custodian and successor custodians in cause No. 270 aforesaid.

7. The Answer or Answers of defendants in cause No. 270 aforesaid.

8. The Order of reference to a Master in cause No. 270 aforesaid.

9. The Motion for Decree filed in cause No. 270 aforesaid.

10. The Stipulation of Settlement filed in Cause No. 270 aforesaid.

11. The Memorandum on Intervention of November 13th, 1935, in cause No. 270 aforesaid.

12. The Decree of February 1st, 1936, in cause No. 270 aforesaid.

It is further stipulated that substantially identical pleadings were filed by other insurance companies, and by the defendants, and the same proceedings had, in causes Nos. 271 to 426, inclusive, in the same Division and District of the said District Court of the United States; and that in all of said causes (Nos. 270 to 426, inclusive) said interlocutory injunctions were not dissolved, and said funds were impounded, until February 1st, 1936.

It is further stipulated that the plaintiff Insurance Companies aforesaid on December 31st, 1929, promulgated a sixteen and two-thirds per cent (16-2/3%) increase in rates and so advised the then Superintendent of Insurance [fol. 486] of the State of Missouri; that before the latter acted thereon, the original bills in equity aforesaid were

filed; that thereupon said Superintendent of Insurance refused to approve said increase in rates; and that plaintiff Insurance Companies took no legal action at any time with reference to said increase in rates or to said refusal of the said Superintendent of Insurance to approve said increase in rates other than to file and prosecute causes Nos. 270 to 426, inclusive, as aforesaid.

It is further stipulated that any party hereto may, in this proceeding or upon any appellate review thereof, make reference to and incorporate in the record before this Court or in the record upon appellate review, (even if not so incorporated in the record before this Court) any report made by any Master prior to February 1st, 1936, in the causes aforesaid, or any part of any such report.

It is further stipulated that each item of proof aforesaid, and each fact stipulated to, shall be received subject to objections on behalf of each defendant upon grounds of materiality, relevancy, competency and the binding character thereof upon said defendant; and exceptions shall be allowed each defendant with the same force and effect as if such items or fact had been duly offered in evidence, objection thereto made by each defendant upon the grounds aforesaid, and such objection overruled by the Court with exception then and there taken and allowed.

[fol. 487]

United States of America,
By Richard K. Phelps,
Asst U. S. Atty
R. R. Brewster
John G. Madden
Attorneys for Defendant,
Thomas J. Pendergast.

James P. Aylward,
George V. Aylward,
Ralph M. Russell,
Terrence M. O'Brien
Attorneys for Defendant,
Robert Emmett O'Malley

Forest W. Hanna
Attorneys for Defendant,
A. L. McCormack."

[fol. 488] (The documents and exhibits considered in evidence under the foregoing Stipulation are as follows:)

BILL IN EQUITY

(The Bill in Equity in Cause No. 270 has been lost, but the following is a typical Bill in the litigation in question:)

"In the District Court of the United States for the Central Division, of the Western District, of Missouri. Insurance Company, a corporation, Plaintiff, vs. Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri, and Stratton Shartel, Attorney General of the State of Missouri, Defendants. Injunction

BILL IN EQUITY.

Now comes the above named plaintiff, Insurance Company, and for cause of action against defendant Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri and Stratton Shartel, Attorney General of the State of Missouri, states:

FIRST:

[fol. 489] Plaintiff is now and at all times hereinafter was a corporation of a state other than the State of Missouri and was and is a citizen of and organized and existing under and by virtue of the laws of the State of _____, as a stock fire insurance company; plaintiff was at all times hereinafter mentioned and now is authorized by its charter to do a business of fire (lightning), hail, windstorm and allied lines of insurance usually done by fire insurance companies; and it, the plaintiff, is a citizen and a resident of the state last above named.

Defendant, Joseph B. Thompson, is now and at all said times was a citizen of the State of Missouri, residing in the Central Division of the Western District of Missouri, and said defendant is and was at all times herein mentioned the duly appointed, qualified and acting Superintendent of the Insurance Department of the State of Missouri.

Defendant, Stratton Shartel, is Attorney General of the State of Missouri and as such Attorney General is the

chief law enforcing officer of said State, having supervision of the enforcement of the laws on behalf of the State against any person or corporation who may be claimed to have violated the law and, generally, to enforce the laws of said commonwealth. Said Stratton Shartel is a citizen of the State of Missouri and resident of the Central Division of the Western District of Missouri.

[fol. 490]

SECOND:

The Court's jurisdiction depends upon the following grounds:

This is a suit of a civil nature in equity. The matter in controversy is of the value of $5000 and exceeds, exclusive of interest and costs, the sum or value of $3000; and

(1) arises under the Constitution of the United States, namely, the powers asserted and claimed by the defendant, the Superintendent of the Insurance, Department of Missouri (hereinafter specifically set forth), and the acts by him done, and the failure of action whereof he is guilty (hereinafter more asserted in detail) applied as against the plaintiff are asserted to be violative of the first section of the Fourteenth Amendment of the Constitution of the United States, in that the same (a) deny to plaintiff the equal protection of the laws; (b) deprive the plaintiff of its property and liberty without due process of law;

(2) arises under the Constitution of the United States, in that section 6274 and section 6287 and section 6311, Revised Statutes of Missouri, 1919, and section 6283, Revised Statutes of Missouri, 1919, as amended (1927 Annotated Supplement to Missouri Revised Statutes 1919 — Laws of Missouri 1923 S. B. 329); (which said sections 6274 and 6283 are the supposed laws by virtue of which the authority of regulation of rates of insurance by the said Joseph B. Thompson, in his actions and omissions [fol. 491] hereinafter recited were and are asserted, and section 6287 is the penalty statute under which the defendant, Stratton Shartel, threatens to proceed and will proceed if not enjoined) are void and violative of the first section of the Fourteenth Amendment of the Constitution of the United States, in that they and each of them (a) deny to plaintiff the equal protection of the laws; (b) deprive the plaintiff of its property and liberty of contract without due process of law; and section 6311 Revised Statutes of Missouri 1919 under which threat of

revocation of licenses for bringing this suit in federal court is asserted, is in contravention of Section 2, Article III, of the Constitution of the United States.

(3) is between citizens of different states, namely, between citizens of Missouri and a citizen of a foreign state, the defendants, and each of them, being citizens of the State of Missouri, and the plaintiff being a citizen of

THIRD:

The facts are as follows:

(1) Plaintiff is and at all time herein mentioned was a stock fire insurance company engaged in the business of fire (lightning), hail and windstorm insurance and doing in addition allied lines of insurance authorized by its charter. Said plaintiff was at all times herein mentioned and now is authorized and licensed to do and doing said business in the State of Missouri, by license issuing (and annually renewed) from the constituted authorities [fol. 492] of said state, namely, from the Superintendent of the Insurance Department of the State of Missouri.

In order to conduct its business in the State of Missouri, plaintiff has been obliged to establish, and did, upon its entry upon the doing of business in said state, in the year , establish local agencies in the various cities and towns in the state, which agencies so established are of great value. Without such established agencies it would be impossible for the plaintiff to conduct its business of insurance in the State of Missouri, and said established agency plants of the plaintiff are of great value to the plaintiff, namely, of the value of five thousand dollars ($5,000).

Plaintiff has at great cost and expense made, and caused to be made, elaborate surveys, and from such surveys compiled maps, or caused the same to be compiled, which are in some part furnished and supplied to the agents of the plaintiff, and in some part copies retained in its supervisory office, and used and employed in the writing of insurance in the State of Missouri and in locating and ascertaining the nature, character, and detail of risks subject to insurance. Said maps and surveys are of a reasonable value in excess of the sum of one thousand dollars ($1,000).

In accordance with the requirements of section 6270, Revised Statutes 1919, the plaintiff has compiled and does now maintain in the State of Missouri a public rating record through medium of Missouri Inspection Bureau, [fol. 493] including extensive maps, surveys and other data comprehending the result of inspection of many thousands of insurable property risks in said state, from which data and compilations the rates of premium applicable to such respective risks in this state may be ascertained upon the making of or application for insurance thereon. Such rating record includes general basis schedules and embodies basis rates, charges, terms, conditions, permits and standards, and such other data as may be necessary for the computation and promulgation of equitable rates and rules of practice. Such records show the forms and endorsements upon which each rate is predicated and show the changes of the rate to be made on account of the employment or omission from the insurance of said several forms or endorsements. Such rating records of the plaintiff are of value of more than three thousand dollars ($3,000).

(2) In December, 1929, and during all the time from January 1, 1924, to the present time, and at the time of the making and filing of increase on the part of the plaintiff hereinafter more specifically mentioned, and ever since that time, there were and now are in force certain public laws of the State of Missouri, more specifically described as follows: (Article VIII embraces sections 6270 to 6288, both inclusive.)

Section 6270, Revised Statutes Missouri 1919, requires every fire insurer, or other company insuring against the risk of loss by fire, lightning, hail or windstorm to maintain a public rating record, from which the rate of pre- [fol. 494] mium applicable to each risk in the state to be written by such insurer may be ascertained in advance. By such public law, such record is required to include general basic schedules, basic rates, charges, terms, conditions, permits and standards, and such other data necessary to the computation or promulgation of equitable rates and rules of procedure and showing the forms and endorsements upon which each rate is predicated; and it, the plaintiff, did during all said time and still does, keep and maintain such rating record in the offices of Missouri Inspection Bureau in the said state and in its separate offices and agencies.

Section 6274 Revised Statutes of Missouri 1919, of said Statutes provides, among other things:

'All public rating records required to be maintained by this article, whether kept by insurers separately or actuarial bureaus, shall show the rate which such insurer proposes to charge and collect; but any insurer maintaining its own public rating record, or any actuarial bureau shall be permitted to change or lower its rate or rates whenever it sees fit: Provided, that rates shall not be raised until at least ten days' notice has been given by the insurance company to the Superintendent of Insurance and his approval obtained; but in making a change it shall be required to make the change in writing on its public record, and to immediately give notice thereof to the superintendent of insurance.'

Section 6281, Revised Statutes of Missouri 1919, of Missouri Statutes provides:

'Each such company shall also report (annually) the total amount of its earnings on unearned premiums, and such other matters as the superintendent of insurance may require.'

[fol. 495] Section 6283, amended in 1923 and appearing as Sec. 6283 -- 1927 Annotated Supplement of Missouri Statutes, provides for the powers of the Superintendent of the Insurance Department of the State of Missouri and, among other things, provides that the said Superintendent is:

'empowered to investigate the necessity for a reduction of rates. If, upon such investigation, it appears that the rates charged in this State by the stock fire insurance companies for the five years next preceding such investigation are producing a profit in excess of what is reasonable, he shall order such reduction of rates as will, in his opinion, produce a fair and reasonable profit only. Any such reduction ordered by the Superintendent of Insurance shall be applied by the companies, subject to his approval. If the companies do not, within thirty days, submit a classification, or classifications, which meet the approval of the Superintendent of Insurance, he shall apply such reduction in such manner as appears to him to be just and equitable. In determining the

question of rates and profits, in accordance with this article, the Superintendent of Insurance shall give proper and reasonable consideration to the conflagration liability both within and without the state. He shall also take into consideration the acquisition cost and administration expense of such companies, and all earnings of such companies, including investment profits. He shall also consider whether or not the underwriting activities of such companies are conducted on a reasonably economical basis, and whether or not their investments have been and are being made in a safe and reasonable manner, it being the intention of this section to provide that policyholders shall not be charged rates which will cover losses occasioned by extravagant methods or unsafe and speculative investment of funds.'

Section 6287, Revised Statutes Missouri 1919, is the section providing for penalties as respects any violations of provisions in contemplation respectively of Sections 6270 and 6286, inclusive, which, together with said Section 6287, [fol. 496] are all contained in Article VIII in said Statutes, and it is by said Section 6287 provided:

'The superintendent of insurance, if he shall find that any insurance company or any officer, agent or representative thereof, has violated any provision of this article, may in his discretion revoke the license of such offending company, officer or agent, but the revocation of the said license shall in no manner affect the liability of such company, officer, agent or representative to the infliction of any other penalty provided by the laws of this state. Any fire insurance company or any director or officer thereof, or any agent or person acting for or employed by such company who, alone or with any other corporation, company or person, shall wilfully do or cause to be done or shall wilfully suffer or permit to be done any act, matter or thing in this article prohibited or declared to be unlawful, or who shall wilfully suffer or permit any act, matter or thing in this article required to be done, or shall cause or wilfully suffer or permit any act, matter or thing so directed by this article to be done, not to be done, or shall be guilty of any infraction of this article, shall be deemed guilty of misdemeanor and shall upon conviction thereof be punished by a fine not to exceed five hundred dollars for each offense: Provided, that if the offense for which any person shall be convicted as aforesaid shall be an

unlawful discrimination, such person shall be punished by a fine of not to exceed five hundred dollars or by imprisonment in the county jail for a term not exceeding ninety days or by both such fine and imprisonment.'

Section 6222 of Missouri Revised Statutes 1919 makes provision for a report, annually, by insurance companies to the Superintendent, of their doings and affairs and the method and manner in which they shall state and arrive at the surplus, wherein it is, among other things, provided, that they shall state and take into account, as disclosing their surplus and the state of their affairs:

[fol. 497] 'Fifth: premium reserved or amount required to safely reinsure all outstanding risks, to be estimated by taking fifty per cent. of the gross premiums on all unexpired fire risks that have less than one year to run, and a pro rata of all gross premiums on risks that have more than one year to run.'

By Section 6311 of Missouri Revised Statutes 1919, it is provided that:

'If any foreign or non-resident insurance company, * * * doing business in this State * * * shall institute any suit or proceeding against any citizen of this State in any federal court, it shall be the duty of the Superintendent of the Insurance Department to forthwith revoke all authority to such company, corporation, association or concern, and its agents, to do business in this State.'

By Section 6333 Revised Statutes of Missouri 1919 it is provided that:

'It shall not be lawful for the directors, trustees or managers of any insurance company to make any dividend, except from the surplus profits arising from their business * * *. Any company violating the provisions aforesaid shall be subject to proceedings for dissolution.'

(3) On December 30, 1929, it, the plaintiff, was an insurance company commonly known as a fire insurance company authorized by its charter to effect insurance against the risk of loss by fire (lightning), hail and windstorm, and did maintain a public rating record in the State of Missouri from which the rate of premium applicable to each risk in the State of Missouri to be written by said company might be ascertained in advance of the making of

insurance thereon, which rating record was full and com- [fol. 498] plete and in compliance with the provisions of Section 6270 of Missouri Statutes, which public rating record was by it publicly maintained in the office of Missouri Inspection Bureau an actuarial bureau, located in St. Louis in said State.

And it, the plaintiff, was duly licensed and authorized to do such business in the State of Missouri, and in all things complied with the provisions of the statutes of Missouri for entry upon and doing the business of fire and windstorm and allied kinds of insurance in said state.

And it, the plaintiff, says that prior to December 30, 1929, there existed and had been created and existing a level of rates of premium charge upon fire insurance and a level of rates of premium charge upon windstorm insurance, established and existing uniformly through said state for a long time, namely, more than six (6) years prior to that date, which was conformed to and adhered to by plaintiff and in general by stock fire insurance companies doing such classes of business in the State of Missouri. Such level of rates was applied upon mercantile, manufacturing and special hazard risks by relative measurement and determination of hazard inhering in various risks, applied upon rules, standards, analysis and fixation of basic rates, and charges and credits applied thereto.

And upon risks not reasonably subject to analysis a common rate base was applied more or less flat in its nature but variant in the ultimate premium charge by [fol. 499] application of common factors relating to structure, protection and other elements of difference in risks deigned to make charges vary only because of differences in hazard. Such rates so based were applied with practical uniformity throughout the state and adhered to and employed by plaintiff and generally by stock companies doing such business in the state. The administration and creation of this relativity and level of rates was administered for plaintiff largely through medium of Missouri Inpection Bureau, which ascertained and determined relatively equitable rates according to rules of measurement in general known as analytic system for measurement of relative fire hazards and divers schedules by it created, administered and applied, and by inspection and examination of risks and hazards inhering in the various properties in the state. In the creation of an equitable relation of risks,

one to the other, the matter was subject to scientific determination, inspection and application of engineering, and fire-prevention knowledge and experience, and the plaintiff and other stock companies doing business in Missouri subcribed to and were members of Missouri Inspection Bureau.

Upon the 30th day of December, 1929, plaintiff did change and increase the level of its rates upon (1) fire (and lightning), and (2) windstorm insurance, and upon each of such classes of insurance, and did make such change and increase of rates upon its public rating record [fol. 500] and, on said day, give notice to the Superintendent of Insurance thereof, making such change on its public record in writing, and immediately giving notice thereof to the Superintendent of Insurance, which said notice so given to the Superintendent of the Insurance Department of the State of Missouri, (except for signatures thereto appearing,) is in words and figures as appears in the plaintiff's Exhibit 1 hereunto attached and made a part hereof by reference as if herein fully set forth. And plaintiff says that the name of it, the plaintiff, was unto said notice appended.

And the plaintiff says that by said change in its public record and upon the giving of said notice the plaintiff did thereby increase its rates upon fire (and lightning) insurance sixteen and two-thirds per cent. (16 2/3%) above the level of rates theretofore existing, which pre-existing level had existed for a long time theretofore, to-wit, more than six (6) years.

Plaintiff further states that neither it nor other insurance companies doing business in said State of Missouri at any time had, nor do they now make, insurances against the hazard of lightning by separate policies of insurance but such insurance is uniformly made as an incident to and by the same policy whereby fire insurance is made, and no separate or added charge is made because of carrying the hazards of lightning; and where the plaintiff hereinafter refers to fire insurance, the said term 'fire insurance' is designed and intended to include and embrace [fol. 501] 'lightning' as if said term were in each case repeated.

And on said same date, namely, December 30, 1929, the plaintiff did change its rate or premium charge for insurance against the hazard of windstorm, by increasing

the premium rates thereon sixteen and two-thirds per cent (16 2/3%) above the level of rates immediately theretofore existing, which previously existing level of rates had existed for a long time theretofore, to-wit, six (6) years.

And the plaintiff did make like change in writing in its public rating record and give like notice to the Superintendent of Insurance of an increase and change or rate or premium charge respecting windstorm insurance as it did respecting fire insurance, and did increase premium rates thereon sixteen and two-thirds per cent. (16 2/3%) above pre-existing level immediately, as more specifically appears by the plaintiff's Exhibit I hereunto attached.

And the plaintiff says that by its said change on its public record in writing, and in its said notice to the Superintendent of the Insurance Department of the State of Missouri (plaintiff's Exhibit I), the changes in the rates upon fire insurance and the changes in rate upon windstorm insurance were, and each of them was, altered and so increased and therein stated and declared to be effective February 1, 1930, (by which notice and filing the plaintiff intended and stated, and accomplished an [fol. 502] increase not to be placed in effect immediately upon the said filing, but to be enforced and placed in effect on February 1, 1930); and the approval of the Superintendent of Insurance was requested at such reasonable time before the said effective date specified as would permit the practical application of such rates.

And plaintiff further states that it, the plaintiff, has from month to month, to-wit, in each month after December 30, 1929, had request from the Superintendent of Insurance that the effective date be extended to a future date, and the plaintiff has complied with said requests, and, before the effective date so specified, did, during the month of January, specify and file a new effective date, namely March 1, 1930; and did, during the month of February, upon like request, specify and file a new effective date, namely, April 1; and did, during the month of March, file and specify a new effective date, namely, May 1; and did, during the month of April, upon like request, file and specify a new effective date namely, June 1; and it, the plaintiff, did specify and make filing of such newly designated effective dates of its said rate increases be-

cause of representations and assertions by the Superintendent of the Insurance Department of Missouri that he had not had opportunity reasonably to acquaint himself with the facts and desired that the matter be extended to permit further investigation into the same; and each of said changes of effective date were made in writing [fol. 503] on the public record of the plaintiff in Missouri and notice thereof given to the Superintendent of the Insurance Department of Missouri before the arrival of the effective date theretofore specified; and the plaintiff attaches hereto, as plaintiff's Exhibit II, a true copy of the notice transmitted by it in April, 1930, which is made a part hereof by reference as fully as if herein recited, and plaintiff says that the notices previously sent and made were to like effect, except as to specification of respective effective dates in said various notices contained.

(4) And plaintiff further states that the defendant, The Superintendent of the Insurance Department of the State of Missouri, well knowing that it, the plaintiff, suffered great loss from day to day by failure and neglect on his part to act upon and approve said rate changes and increases, and by failure of said increases to become effective, nevertheless to approve the same, or to give any notice of approval thereof to the plaintiff or in any wise to take any action thereon the Superintendent of Insurance has wholly neglected and failed, and said Superintendent has made no approval and no disapproval of the said filings as respects either fire insurance or windstorm insurance; but, to the contrary, to the present time has taken no action thereon and insists and asserts that the plaintiff is bound to continue to write insurance upon said classes of insurance at the rates existing prior to December 30, 1929, and without including in the premium [fol. 504] charges of the plaintiff the said respective increases aforesaid. But although the defendant, the Superintendent of Insurance, has taken no action on the part of him, the said Superintendent, and has made no ruling or order, approval, disapproval, consent or denial of consent to said newly created rates; nevertheless he asserts a lack of power in plaintiff to collect, enforce or receive such increases without approval of the Superintendent first had.

(5) And plaintiff further alleges that, together with its notification of increase, namely, the plaintiff's Exhibit I, the plaintiff did deliver and file with the Superintend-

ent of the Insurance Department of the State of Missouri, a statement of the experience of it, the plaintiff, year by year for the five (5) calendar years prior to that time for the State of Missouri, namely, the experience of the plaintiff of income and outgo upon its business of insurance upon the hazard of fire and upon the hazard of windstorm, as well as other classes, for the five (5) calendar years, 1924 to 1928, both inclusive.

And it, the plaintiff, says that a statement and tabulation of income and outgo of other fire insurance companies doing business in the State of Missouri was at the same time delivered to the Superintendent of Insurance, so that he had before him and there has been in his possession since December 30, 1930, the experience of each and all stock fire insurance companies doing business in Missouri, showing their income and outgo on their business of in- [fol. 505] surance, not only in the said classes as respects which an increase was so applied for, but there was delivered to him also the experience of the plaintiff and each and all other stock fire insurance companies doing business in the state for said period upon all other classes of insurance by them written, as well as upon the classes upon which an increase was so made and demanded, as aforesaid. And in addition the said Superintendent has detail reports of experience by years from plaintiff and all other fire insurance companies doing business in the state which he has exacted annually on blanks prescribed by said defendant.

And plaintiff further alleges that fire (lightning) insurance is a distinct class of insurance, the hazards whereof are variant from and determination of equitable relative charges for undertaking which and affixing of premium charge for assumption of risks involves considerations not inhering in other classes of hazards insured against by plaintiff and other fire insurers, in that structure, protection, exposure and nature of contents, as to inflammability and damageability, are of prime importance in fire insurance, and the subject of scientific study, measurement and determination of hazards, which make it a class apart; the affixing of rates of premiums for assumption of which involve elements not pertaining to other classes. And windstorm insurance is a class apart, wherein the wind resisting type of structures, the geographical location repecting likelihood of storms, the na- [fol. 506] ture of the terrain as influential respecting

likely damage, the stability and permanence of attachment to the earth and like considerations involve problems not inhering in other hazards. And the State of Missouri, and each of the other states of the Union, recognize the propriety of such classification and require and exact statements annually, separately stating underwriting experience upon fire risks, and separately upon tornado or windstorm risks. And those engaged in and familiar with the business universally recognize and treat said classes as distinct and separate and entitled to self-sustaining and profit-making premium charges for insuring risks against such hazard.

(6) And the plaintiff further says that, together with Plaintiff's Exhibit I, the plaintiff delivered to the Superintendent of the Insurance Department of Missouri tabuation of the Missouri experience of the plaintiff for the said period, 1924 to 1928 inclusive, compiled from its records, tabulating net written premiums, paid losses and expenses, and also earned premiums and incurred losses and expenses, year by year, by classes, for the said five-year period.

And it, the plaintiff, says that by 'net written premiums' as the said term is employed in this bill, is meant the Missouri net premiums stipulated in gross in the policies written during said term, deducting therefrom premiums returned to policyholders or subject to return. Net premiums written therefore are the premiums stipu- [fol. 507] lated in the policies so far as they are retained and lawfully subject to be retained by the plaintiff. And by 'paid losses and expenses,' as the said terms are here employed, the plaintiff means losses and expenses expended and paid during said period upon Missouri business, for the payment whereof the plaintiff was obligated.

And the plaintiff did also make statement to the Superintendent and deliver figures to him, together with Plaintiff's Exhibit I, a true tabulation of its earned premiums and incurred losses and expenses during the said terms of years, and statement and calculations of plaintiff's profit or loss upon its Missouri business during said term.

And by 'earned premiums' of a period under calculation, the plaintiff means the Missouri premiums paying for indemnity furnished during said period, excluding therefrom any collections during said period paying for insurance subsequent to said term upon policies extend-

ing to later dates, and including as income or earned premiums the pro rata of premiums upon policies written prior to such term under computation, paying for insurance during the term mentioned. And by 'incurred losses and expenses,' as said terms are employed, the plaintiff means the Missouri losses for which the plaintiff became liable during said term and obligation for which arose or became fixed; and, those expenses for which plaintiff became liable upon such business, and upon which obligation matured during said term.

[fol. 508] And the plaintiff says that its net written premiums and its paid losses and expenses and over-plus or deficiency of such premiums to meet such losses and expenses for the said term in question are as follows:

STATEMENT UPON NET WRITTEN AND PAID BASIS.
1924 to 1928 INCL.

	Fire	Windstorm	Hail and all other	Total
Written Premiums	$	$	$	$
Paid Losses and Expenses				
Overplus or deficiency of written premiums to meet paid losses and expenses (overplus +; deficiency –)				

And it, the plaintiff, says that the profit or loss upon its business is properly to be computed upon the basis of earned premiums as income and incurred losses as outgo, and that figures upon such basis were submitted to the Superintendent and plaintiff says that its earned premiums and its incurred losses and expenses upon fire, windstorm and all other classes, and the loss upon conduct of said business during said period in Missouri are as follows:

[fol. 509]

EXPERIENCE UPON EARNED AND INCURRED BASIS.
1924 to 1928 INCL.

	Fire	Windstorm	Hail and all other	Total
Earned Premiums	$	$	$	$
Incurred Losses and Expenses				
Underwriting Loss				

And the plaintiff further states that since the making of said filing, another calendar year has elapsed and been reported to the Superintendent of Insurance in the annual statement of plaintiff, and that although the plaintiff asserts that the five-year experience existing when the plaintiff made its said filing forms a true and just period for the test and admeasuredment of the experience of the plaintiff, whereby to measure probability for the future yet for the information of the court plaintiff submits the experience by it had in the State of Missouri for the year 1929, which additional experience so truly stated is hereunto attached as Plaintiff's Exhibit III and made a part hereof by reference.

Plaintiff further states that the aggregate experience of stock fire insurance companies doing business in Missouri for the five-year period, 1924 to 1928, both inclusive, (submitted to the Superintendent with Plaintiff's Exhibit I) was as follows:

[fol. 510]

WRITTEN AND PAID BASIS

	Fire	Windstorm	Hail and all other	Total
Written premiums	$82,198,713	$12,090,700	$22,539,475	$116,828,888
Paid losses and paid expenses	88,982,899	22,472,313	21,971,401	133,426,613
Deficiency of premiums to meet losses and expenses	6,784,186	10,381,613	(+568,074)	16,597,725

Said companies in the aggregate suffered a loss upon the conduct of their business above income in the State of Missouri, namely insurred losses and expenses in excess of premiums earned by them upon their business of fire insurance, and upon windstorm insurance, and upon their total business in Missouri. In other words, their outgo exceeded income upon each such class and upon all classes; (which experience was filed with the Superintendent, with Plaintiff's Exhibit I) as follows:

	Fire	Windstorm	Hail and all other	Total
Earned premiums	$79,452,252	$ 9,827,135	$22,184,950	$111,464,337
Incurred losses and incurred expenses	89,182,741	22,573,924	23,003,053	134,759,718
Underwriting loss	9,730,489	12,746,789	818,103	23,295,381

[fol. 511] (7) And it, the plaintiff, says that if it, the plaintiff, continue the writing of its business of fire insurance at preexisting rates free of increase of December 30, 1929, effective June 1, 1930, and continue the writing of windstorm insurance at preexisting rates, namely, at rates obtaining prior to December 30, 1929, the plaintiff will, in so doing, conduct its business in each such classes and upon all its business of insurance, in Missouri, at an actual loss and without any compensation whatever to the plaintiff for the doing of said business, but, to the contrary, the outgo of the plaintiff upon the conduct of such business in said classes and upon the whole will exceed its income.

And it, the plaintiff, says that its outgo on said classes respectively has been in excess of its income for more than six years prior to the increase so placed in effect by it and whereof it gave notice to the defendant, the Superintendent of the Insurance Department of the state of Missouri.

And it, the plaintiff, says that it has, during the period of five years, 1924 to 1928, and in the year 1929, conducted its business of fire insurance in Missouri at a loss upon the conduct of said business as aforesaid and upon its business of windstorm insurance during said period of five years it has conducted its said business in Missouri at a loss as aforesaid and conducted its insurance business in said state at a loss, and it, the plaintiff, will suffer like losses in the future if it continue writing business at the [fol. 512] former level of rates namely outgo in excess of income and will suffer and does now suffer a daily loss in the conduct of its business of $ per day, which loss it will continue to suffer from day to day if it be not permitted to increase the level of its rates upon respective classes of fire insurance and windstorm insurance according to its said filings.

And the plaintiff says that the income from the conduct of its said business without the said increases is so low as to be wholly inadequate to meet losses and reasonable expenses and to give to plaintiff any reasonable compensation or any compensation whatsoever, and will if continued to be done at preexisting rate level cause the plaintiff to do business at less than a reasonable profit, namely, with no profit whatsoever.

And the plaintiff says that if compelled to so do business at preexisting rates it will be forced either to do business at a loss and without any reasonable profit and without any profit whatsoever, or alternatively to withdraw from doing business in the state of Missouri.

(8) And it, the plaintiff, says that it has an established business in the state of Missouri and has agency connection and agency contracts with divers agents in the state of Missouri and has created a business commonly known as an agency plant and has an established business and a good-will and has created maps, surveys and rating records individually and as part of the records of Mis- [fol. 513] souri Inspection Bureau, to which plaintiff has contributed; and it, the plaintiff, has an established business in the state of Missouri respecting fire and windstorm insurance respectively of the value of more than $5,000, the value of which would be entirely destroyed if the plaintiff be required to abandon the same or required to conduct its business without any profit. And it, the plaintiff, says that if it continue to do its business at inadequate and confiscatory rates aforesaid or withdraw from the doing of business in said state, in either alternative the plaintiff will be deprived of its property without due process of law and its property will be confiscated and lost to it, although it, the plaintiff, says it has during all the times mentioned, conducted and now conducts its business prudently, economically and soundly and it, the plaintiff, is a well established insurance company, and has conducted its business for many years in various states of the Union competitively with others in the same business with success and with progressive improvement of its business, and is entitled by law to conduct its business at a reasonable profit.

WHEREFORE, the plaintiff says that the failure and refusal of the said Superintendent of the Insurance Department of Missouri to approve its said increase, and his threatened actions designed to and intended to prevent plaintiff from so doing without approval of the Superintendent, and the actions of the said Superintendent and [fol. 514] each of them, as in this bill set out, are designed to and do prevent the plaintiff from charging and collecting its said increase, and lessen and destroy the value of plaintiff's established business in said state. And each and every of his said actions and omissions, if not enjoined,

deprives it, the plaintiff, of its property and liberty of contract, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States and Section 30 of Article II of the Constitution of the State of Missouri.

And the plaintiff says that said Section 6274, Revised Statutes Missouri 1919, is unreasonable, confiscatory, unconstitutional and void, as against the plaintiff, for these reasons:

(a) Said statute requires that the approval of the Superintendent of the Insurance Department of the State of Missouri be obtained, but provides no method or means for compelling or enforcing the action by the superintendent, or to enforce or obtain an approval, if the plaintiff be entitled thereto, or compel a ruling, but to the contrary thereof the Supreme Court of Missouri, the highest court of the state, has construed and interpreted said statute to place the arbitrary right of approval or disapproval of a proposed increase in the superintendent, and that if he fails to act or disapprove there is no means or method provided or permitted by law in the said state, whereby relief may be had from the confiscatory effect of such action.

[fol. 515] WHEREFORE, plaintiff says said Section 6274 and the supposed power therein to the superintendent to make disapproval of said increase, and the supposed power to withhold effectiveness of increase and the burden of penalties and imprisonment provided if plaintiff proceed regardless of said section 6274 are in derogation of constitutional rights of plaintiff, and operates as a deprivation of property and liberty of contract of plaintiff without due process of law, and a denial of equal protection of the laws to the plaintiff, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States and Section 30 of Article II of the Constitution of the State of Missouri.

(b) Said section 6274 does not nor do any other of the laws of Missouri provide any standard rule or guide whereby the superintendent shall be governed in his consideration of an application for approval, but permits the same to rest in his untrammeled and arbitrary discretion not governed by any rule or guide, and thereby said statute and each and every of the requirements of it and any

act pursuant to it deprives the plaintiff of its property without due process of law and violates its constitutional right in contravention of Article III, and of Section 1 of Article IV, and of Section 30 of Article II of the Constitution of Missouri, and in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

[fol. 516] (c) And plaintiff says that although said void statutes Sections 6270 and 6287, all being part of a single article, to wit, Article VIII, do, by Section 6274, impose a supposed obligation on the plaintiff to make public record in writing and to give notice to the Superintendent of rate change when the same is an increase, and requires securing his approval; nevertheless, the supposed burdens thereby imposed are imposed only upon stock fire insurance companies, and are imposed only upon insurance corporations, but certain mutual companies are entirely exempted from the operation of said provisions, namely, 'all companies organized under Articles XVI, XVII and XVIII, Chapter 50 of the Revised Statutes of 1919'. And by the terms of the various sections of the article, whereof Section 6274 is part and parcel, inclusive of said Section 6274, the burdens thereof are not in anywise imposed upon individuals, or associations of individuals, Lloyds Insurers, (consisting of individuals), associations of individuals styled reciprocal insurers, or mutual insurance companies, although it, the plaintiff, says that said insurers so mentioned, other than stock fire insurance companies, do, and for many years past have done, a large business of fire insurance and of windstorm insurance in the State of Missouri; and by the provisions of said statutes are exempted from the burdens and requirements thereof.

And the plaintiff says that said insurers, consisting of individuals or associations of individuals so mentioned, are in sharp competition with it, the plaintiff, anad have [fol. 517] been for many years past; and that said individuals and associations of individuals are exempted from said Section 6274, and are exempted from provisions of Section 6283, defining and stating supposed standards for guidance of the superintendent in rate hearings, and are exempted from rate hearings and supervision and regulation of rates, and are exempted from the penalties provided by Section 6287.

WHEREFORE, the plaintiff says that the said Section 6274 of Missouri Revised Statutes 1919, and the actions and omissions of the Superintendent, purporting to act pursuant thereto, and the requirements thereof prohibiting and preventing the plaintiff from putting in force, promulgating, collecting and contracting for the increase whereto it is entitled and each of said statutes, acts and omissions of the superintendent, to wit, his requirement upon plaintiff to file notice with and secure approval of the Superintendent, and his omission and failure and refusal to grant and give approval, and failure so to do within a reasonable time, and each such action deprives it, the plaintiff, of the equal protection of the law and deprives it of its property and liberty of contract without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(d) The provisions of the said statute, Section 6274, are imposed upon incorporated companies only, whereas private persons, Lloyds Underwriters, and divers other [fol. 518] unincorporated associations and individuals, are by law permitted to conduct the business of insurance, such as that in which the plaintiff is engaged, and the same is conducted by associations of persons, such as reciprocal insurers, Lloyds Underwriters and individuals, in the State of Missouri, and have so done for a long time past. The amount of indemnity and premium to be charged for undertaking hazards is a matter of private negotiation and agreement, is a natural right, and cannot be compelled. There is no power in the State of Missouri, under the Constitution of the United States, to fix rates and charges for services rendered by it the plaintiff to others, or by imposing such burdens on plaintiff and exempting its competitors therefrom, and the attempted exercise of such power, so as to prevent the plaintiff from placing the increase in force which it deems proper, as by it proposed to be done, is the taking of private property of the plaintiff without due process of law, and a denial of the equal protection of the law, contrary to Section 1 of the Fourteenth Amendment of the Constitution of the United States.

(9) And the plaintiff further says that no specific rule or guide is provided in the said statutes of Missouri in anywise guiding or directing the action of the Superintendent to be taken pursuant to Section 6274 in matters of

rate regulation and providing the standards or guides by him to be employed in determining the adequacy and sufficiency, or inadequacy and insufficiency, of rates in case [fol. 519] of application for increase. The only guide or rule in the statutes even inferentially governing the superintendent in any action of approval or disapproval he might take (and the defendant superintendent claims and asserts that Section 6283 is his guide) is that provided by Section 6283 of said statutes, which section the plaintiff says must be considered as and treated as a guide to the action of the plaintiff under Section 6274, if any guidance is to be found in the statutes. And the plaintiff says that said section is by the language thereof made and designed to apply to reductions ordered by the superintendent and is not specifically provided to apply to increases. And the plaintiff says that the said statute is without any guide, rule or standard by which the action of the superintendent shall be controlled and, therefore, violative of law and of the Constitution of the United States, and Constitution of Missouri, unless it may be said Section 6274 is by intendment of said statutes subject to the rules, standards, and guides provided in Section 6283 applicable to reductions, which the plaintiff is informed and believes and, therefore, states to be the claim and contention of the defendant, the Superintendent of the Insurance Department of the State of Missouri.

And plaintiff says that in his consideration of the increase promulgated by plaintiff, defendant, the Superintendent, regards and considers himself bound by, and in coming to his conclusions, intends to and will adopt as a [fol. 520] standard the provisions of Section 6283, and in so doing will in pursuing the statutory directions of said section apply the same to the application and filing of plaintiff, whereby the plaintiff will be debarred of any consideration of its said filing upon the real merits thereof.

And plaintiff further alleges that the delay of defendant in approving the increase of plaintiff, and failure to act thereon, and the threats of said statute, and by defendants, and penalties provided to be imposed if plaintiff should act without approval operate to confiscate the property of plaintiff from day to day; and plaintiff says that it has delayed for five (5) months in putting its increases in force to give opportunity to defendant, Super-

intendent, to act and to have hearings if he saw fit, but in violation of the constitutional rights of plaintiff, the defendant, Superintendent, has had no hearings, nor acted on such increase or in anywise relieved plaintiff from the confiscatory effect of the statute as by him, the Superintendent, administered.

And the plaintiff says that said guides, rules and standards so set up by Section 6283 applied to any proposed action of the Superintendent under Section 6274, in passing upon and determining whether to approve or disapprove an increase proposed, sets up and furnishes an unreasonable, confiscatory, unconstitutional and void set of supposed rules, standards and guides as against the proposed [fol. 521] increase of the plaintiff, for the following reasons:

(a) It is by said Statute Section 6283 provided that the superintendent 'shall also take into consideration the acquisition cost and administration expense of such companies, and all earnings of said companies, including investment profits'; and it, the plaintiff, says that the cost of acquisition of its business is, as to acquisition cost, almost entirely composed of commission paid to agents by contract with them, and plaintiff says that the rate of commissions by is paid are imposed upon the plaintiff by competitive conditions, and that plaintiff is required and compelled to pay commission rates commonly obtaining for acquisition of such business by competitors, and rates of commission generally demanded and received by agents employed by competitors of plaintiff, to which the plaintiff is bound to conform if it desires to receive and retain any business in the said state. And it, the plaintiff, says that available agencies in which plaintiff is represented and those to which it has access where is may hope to secure business are in large part agencies representing companies other than plaintiff as well as it the plaintiff, namely, multiple company agencies. And if it, the plaintiff, should decline to pay going rates of commission, said agents would refuse to do business with plaintiff or would give their desirable business to competing companies or insurers represented by said agents. And it, the plaintiff, [fol. 522] says that its cost of administration and acquisition expense are reasonable, moderate and prudently expended. The administration expense of the plaintiff is regulated by the judgment and experience of its directors

and officers, who are persons skilled and experienced in the business. And it, the plaintiff, says that neither in said acquisition cost, nor in said administration expense, nor in any other expenditures of the plaintiff, in and about its said business in Missouri, has it in any way been wanting in reasonable frugality, but has in all things soundly, conservatively and reasonably regulated its expense, considering the nature of its business.

And the plaintiff says that said Section 6274, and said Section 6283 furnishing a supposed guide and rule for its application and administration, are unreasonable, arbitrary, void and unconstitutional in that by the provisions thereof the cost of the acquisition of business, and the expense in and about the management and administration of the business of insurance are subjected to the judgment, whim and caprice of the Superintendent of Insurance, without providing or stating any standard to which the same should conform. And the plaintiff says that the business of the plaintiff is a private business, and said matters are questions of internal management of the affairs of the plaintiff and within the control and direction of its directors and managing officers, and are affected and governed by competition and other elements not within the control of the plaintiff. And as to the requirement for [fol. 523] taking into consideration earnings including investment profits, plaintiffs says they are in no wise derived or accruing from the conduct of the business of insurance in Missouri, and conduct and management of investments are entirely conducted beyond the limits of the State of Missouri. And profits, if any, derived from investments arise from investment discretion of the plaintiff's officers and managers. And no consideration of investment losses are by said statute provided so that profits, if any, from investments are to be treated as income and losses from the same activities not to be considered as outgo. And because as to acquisition expense and administration expense and earnings of the companies, including investment profits, it is designed and intended by said statute that the same be considered in the aggregate of all companies doing business in the state, whereby the plaintiff would be penalized if the acquisition cost of its competitors, over whom it has no control, be excessive, or so found to be, and the rights of the plaintiff denied and defeated, if, in the opinion of the superintendent, the administration expense of other stock company competitors

of plaintiff are, in his judgment, excessive or unreasonable. And because, plaintiff says, competitors of the plaintiff engaged in stock fire insurance have earnings in large sums and have large investment profits, and the taking of the same into consideration as income in consideration of the rights of plaintiff operates to the injury of the plaintiff [fol. 524] and militates against it, even though its acquisition cost and its administrative expense be (as plaintiff says it is) normal, reasonable and proper. And the experience of said companies are thereby warranted to be found to disclose a profit or a lesser losss than that of plaintiff because of earnings and investment profits of competitors of the plaintiff and applied as against the plaintiff although the plaintiff have no earnings and have no investment profits, or have profits less than it competitors.

Wherefore, the plaintiff says that the said standards so provided are unreasonable, arbitrary and confiscatory, and that the sole standards supposedly existing, to-wit, the standards in Section 6283 provided are null and void, and not enforceable; wherefore, the plaintiff says that no standards of action on the part of the defendant, the Superintendent of Insurance Department of Missouri, exist by virtue of any provision of Section 6274, or by the subposed standards applicable thereto recited in Section 6283, nor are there any standards, rules or guides in any other sections of the said statutes.

Wherefore, the plaintiff says that said Section 6274 and said Section 6283 are in contravention of Article III, and of Section 1 of Article IV, and of Section 30 of Article II of the Constitution of Missouri, and deny to the plaintiff the equal protection of the laws, and deprive it, the plaintiff, of its property without due process of law, in contravention of the First Section of the Fourteenth Amendment of the [fol. 525] Constitution of the United States.

(b) And the plaintiff further says as to the direction of said statute as to the inclusion in expense items of investment profits: Investments of monies of the plaintiff are, and for the entire period from 1924 forward, and prior to that time, were conducted by the plaintiff at its home office outside of the State of Missouri, and the same were in no wise within the power or jurisdiction of the State of Missouri, and the investments on the part of the

plaintiff were of its own monies and the same were in no wise derived from its said business in the State of Missouri, nor located there.

Wherefore, the plaintiff says the said investments of the plaintiff, or the profits therefrom, were not and are not in any wise an element proper, under the constitutional safeguards of the plaintiff, to be taken into account, or to be treated as supposed profits from the conduct of its separate and distinct business of insurance in the State of Missouri.

It, the plaintiff, says that no lawful and constitutional power exists in the defendant, the Superintendent of the Insurance Department of the State of Missouri, to consider and take into account the investment profits, if any, of the plaintiff; and it, the plaintiff, says it had no investment profits, or any other profits, in the said State of Missouri, during the said term and period aforesaid. And it, the plaintiff, says that the said superintendent has [fol. 526] no lawful and constitutional warrant to take into account or weight or consider investment profits of stock companies doing business in Missouri, competitors of the plaintiff, and to measure, weight, or determine any supposed profit or loss of the plaintiff upon the conduct of its said business of insurance, by taking into account or weighing or considering the investment profits of stock companies, competitors of the plaintiff in the State of Missouri.

Wherefore, the plaintiff says that the said Section 6274 and the said Section 6283, and each of them, and the rules, guides and standards therein provided and mentioned, are in no way proper to be administered and applied against the plaintiff upon its application for increase aforesaid; and that any supposed or contemplated action of the Superintendent of Insurance purporting or pretending to proceed, pursuant thereto and requirement of approval from the superintendent are and would be invasions of the constitutional rights of it, the plaintiff. And the said statutes, and each of them, and the proposed action of the said Superintendent of Insurance, and each of his said actions by him contemplated, and by him taken and intended to be taken, as in this bill recited, deny to it, the plaintiff, the equal protection of the laws and deprive it, the plaintiff, of its property and liberty of contract without due

process of law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

[fol. 527] (c) The plaintiff says that said Section 6283 further provides that the superintendent shall, upon his investigation of the profits of the companies, for a five (5) year term preceding an investigation, consider 'whether or not the underwriting activities of such companies are conducted upon a reasonably economical basis, and whether or not their investments have been and are being conducted in a safe and reasonable manner,' it being therein stated to be the intention of that section to provide that policyholders 'shall not be charged rates which will cover losses occasioned by extravagant methods or unsafe or speculative investment of funds.'

And it, the plaintiff, says that the business of it, the plaintiff, was at all times conducted upon an economical basis, under the guidance of experienced and prudent managers, and that the business of plaintiff was long and well established and soundly conducted, and that he, the said superintendent, is not warranted in setting up his untrammeled judgment, without any basis therefor, that the business so soundly established and conducted is not in his opinion economically conducted.

And it, the plaintiff, says that whether its investments were well or badly made, or whether the manner of the making of the same was reasonable or unreasonable, in nowise enters into any proper examination into the profit or loss of the business of insurance of the plaintiff in the State of Missouri, because it, the plaintiff, says that it has at no time asserted or claimed, nor does it now [fol. 528] claim, that any losses upon its investments should in anywise be charged against the State of Missouri, and the determination of profit and loss there, and it, the plaintiff, says that the conduct of its business of investments is distinct and separate, and in nowise related to the determination of profit or loss upon its business of fire insurance or windstorm insurance in the State of Missouri.

And it, the plaintiff, says that said Section 6274 and the supposed standards, rules and guides for application thereof, mentioned and provided in Section 6283, are and each of them is arbitrary, oppressive, unreasonable, unlawful and unconstitutional, in that it, the plaintiff, says whereas it has conducted its business prudently, soundly

and economically, nevertheless, by the provisions of said statute, if the same were valid, the said superintendent would be warranted in declining and refusing to approve the increase of it, the plaintiff, if any one or more of the competitors of the plaintiff engaged in stock fire insurance in Missouri conducted its or their business in such manner as to receive his condemnation respecting the economical basis employed, and the said statute directs that his determination shall rest upon his opinion as to the economy and soundness of the basis upon which the said business is conducted.

And it, the plaintiff, says that the basis upon which the said business is conducted is formulated by its managers and trustees and is conducted by employment of [fol. 529] agents compensated by commissions graduated according to the nature of the business subject to acquisition, the territory wherein the property is located, the expense and cost on the part of various agents in doing business, the competitive conditions arising out of the method of conduct of business of other stock companies, individuals and associations of individuals in competition with the plaintiff. And it, the plaintiff, says that the basis of doing business in the state in acquiring, handling, managing and conducting the same are matters in which the plaintiff has a right to and has exercised its judgment, and the judgment of its directors and officers; and that the superintendent may not lawfully and constitutionally condemn the basis upon which such business exists, which the plaintiff says is the same on the part of the plaintiff and its competitors, and has so been throughout the United States for more than one hundred (100) years last past, and to permit and warrant the said superintendent to substitute his opinion and judgment, that some other basis or method of conduct of the business, or the payment or employment of salaried representatives, rather than commission agents, or employment of agents solely and exclusively acting for the plaintiff, rather than the basis in fact employed of entering into and doing business in agencies common to more than one company, which the plaintiff says is and for more than fifty (50) years last past has been a common and general method of doing business, are all matters which [fol. 530] may not lawfully and under constitutional principles be entrusted to the said superintendent and imposed upon the plaintiff against its will. And it, the

plaintiff, says that the State of Missouri by other provisions of law supervises the investments and the solvency and soundness of the plaintiff and other insurance companies, and inquires into said matters from time to time, and issues licenses to the plaintiff and other insurance companies only if said investments are safe and sound and the business solvent, and such insurance companies warranted in doing business.

And it, the plaintiff, says that there is no power in the said State of Missouri, in the investigation of propriety of rates, to deny or weigh the granting of relief or increase of rates, to which the plaintiff is entitled, or make the same dependent upon whether the business of investment of the plaintiff and other stock companies are conducted in a safe and reasonable manner. And it, the plaintiff, says that the rates charged, and sought to be charged, are predicated upon and ought justly to be predicated only upon the measure of the hazards undertaken, and the reasonable charge for undertaking such hazards, which in no wise involves or embraces any consideration of investment of funds; (And it, the plaintiff, says that it, the plaintiff, has in no wise engaged in extravagant, unsafe or speculative investment of funds), but that such subject of inquiry is foreign to any sound considerations, and is unrelated to and in no wise a reasonable matter [fol. 531] for consideration in affixing or determining propriety of insurance rates.

And it, the plaintiff, says that by the provisions of said sections aforesaid, the rights of the plaintiff are according to the terms of such statutes to be measured and determined by, and to be affected to the injury of the plaintiff, if any competitor or competitors of the plaintiff engaged in said stock fire insurance in the state have, in the opinion of said superintendent, conducted their business upon a basis not considered by him to be reasonably economical; and warrants and directs that he shall, in determining propriety of rate charges, take into account and consider against the interest of the plaintiff, if there be unsound, speculative or extravagant methods of investment of funds by other stock companies, competitors of the plaintiff; whereby the rights of the plaintiff become dependent upon the actions and wrongs of competitors of the plaintiff, over whom and the actions of whom the plaintiff has no control.

And the plaintiff says that upon the considerations foregoing, said Section 6274 and the said supposed guides, rules or standards in Section 6283 and, therefore, the said Section 6283 also, are and each of them, is null, void and unconstitutional and deny to it, the plaintiff, the equal protection of the laws; deprive it, the plaintiff, of its property without due process of law, in contravention of the First Section of the Fourteenth Amendment to the Constitution of the United States.

[fol. 532] (d) Plaintiff further says that said Section 6274, Missouri Statutes, does not, nor do the other sections of said statute relating to the subject of regulation of rates in the State of Missouri, nor any statute of said state, in anywise provide that any notice shall be given to the plaintiff, or any hearing be granted it, if the Superintendent of Insurance shall challenge or question the notification given to him of an increase of rates. And the plaintiff says that although it gave notice to the Superintendent of the Insurance Department of the State of Missouri on December 30, 1929, of an increase of rates, and submitted and gave to him its experience figures upon which it asserted it was entitled thereto, the Superintendent has not at any time given notice to the plaintiff of any hearing, or had any hearing at which plaintiff was present or entitled to be present; and if any hearing has been had by the said Superintendent it has been had by him privately and without the presence of the plaintiff, and without notice to the plaintiff, or knowledge of the plaintiff thereof. And it, the plaintiff, says that the said statute making no provision for notice or hearing, and none in fact been had, that the said hearing, if any has been had, and the procedure had pursuant thereto are wanting in due process of law, and if any determination has or should be made in any wise deprive it, the plaintiff, of the said increase, or disapproving the same, the same may be had and made by the said Superintendent as warranted by the statutes, without any notice or hear-[fol. 533] ing, or any right of notice or hearing in it, the plaintiff, and without any knowledge or means of knowledge on the part of the plaintiff of the matters, records, evidence or other things which the said superintendent has or may claim to have examined or heard.

Wherefore, the plaintiff says that the said supposed power and right, of the Superintendent of the Insurance

Department of the State of Missouri, to proceed to any disapproval of rate increase by the plaintiff is wholly lacking and wanting under proper constitutional safeguards; and that the superintendent has no power by said Section 6274, or any other provision of law, to proceed to or express or make any disapproval of the said increase, or to prevent it, the plaintiff, from placing the same in effect, or to invoke any penalties, or cancel the license of it, the plaintiff, or its agents, or otherwise proceed against it, the plaintiff, for placing such increase in force without the sanction of and approval in said section mentioned.

Wherefore, it, the plaintiff, says that the proposed action of the said superintendent in passing upon or approving or disapproving the said increase, and the threatened action on his part or revoking or canceling licenses of the plaintiff or its agents, and the threatened action of the Attorney General to proceed for penalties or imprisonment as by said statutes provided, are, and each of said proposed actions, on their part, is unconstitutional [fol. 534] and void and the requirements of said statute for the securing of an approval is void, and said Section 6274 is void and of no effect, and the provisions of said Section 6283 and of Section 6287, providing for penalties are null and void, and the same and each and every of said acts, laws and proposed actions will, if in any wise applied to the plaintiff, be an invasion of its constitutional rights and deprive it, the plaintiff, of its property and liberty of contract without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(e) And the plaintiff further says that the said statutes of the State of Missouri, namely, Sections 6274 and 6283, have been construed by the Supreme Court of Missouri as meaning and intending that as to the rights of the plaintiff to an increase, or its being subject to a reduction in rates, they shall permit and authorize the superintendent, and require him to proceed, by considering written premiums and paid losses and expenditures, and thus arrive at a determination that the plaintiff has suffered a loss or made a profit on its business. And said statutes, as so construed by the Supreme Court of Missouri, require the Superintendent of Insurance to reject from any consideration the liabilities of the plaintiff for losses and

expenses incurred, for which it is liable, but which have not yet been paid, during the test period employed; and authorize, empower, and require the superintendent to reject from consideration the liabilities of the plaintiff for [fol. 535] its obligations of the future, namely, its liability upon its unexpired policies and the premium unearned thereunder and for a premium reserve, as prescribed and required to be stated under Section 6222. Wherefore, by said statutes, as so construed by the Supreme Court of the State of Missouri, although the plaintiff had liability for its obligations so undertaken, and is prohibited from using or employing the monies representative thereof for dividends or other purposes of its own, yet the plaintiff is by said statutes debarred from asserting before the superintendent and the superintendent is debarred from treating or taking the same into account as a liability of the plaintiff, in the determination of the rates it shall charge its policyholders, or in determining the profit or loss it has sustained on its business, and will sustain.

And the plaintiff says that the said statutes of the State of Missouri, as so construed, are oppressive, unconstitutional and void, in that if the plaintiff be subject to and bound by the provisions of said statutes, it is compelled to reserve the said sums and is not permitted by law to treat the same as surplus or earnings, and yet it, the plaintiff, would be debarred from setting the same up as a liability in ascertaining its experience for the past, and its probable experience for the future. In all of which respects, the said statute invades the constitutional rights of the plaintiff and takes its property without due process [fol. 536] of law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

And it, the plaintiff, says that the said Section 6283 and, therefore, the said Section 6274, has been construed by the Supreme Court of Missouri, the highest court of said state, to be properly construed, and, in the light of the other statutes of the state of Missouri, to mean and provide that the written and paid premium basis shall be employed, and that no deduction may be made from the supposed income in setting up a profit and loss statement of the liabilities, which by the other provisions of said laws, namely, by Section 6222 are required to be set up and maintained. And it, the plaintiff, says that the requirements of said last mentioned section are valid and

just, and represent a fair, reasonable and proper liability, which is set up and maintained in the accounts and books of all insurance companies, and required by the laws of every state of the United States, to be reserved and set up as a liability.

And it, the plaintiff, says that to reject said liabilities and treat the same as non-existent is arbitrary, unreasonable and unconstitutional.

And it, the plaintiff, says that it, the plaintiff, has and did have for the term of five (5) years above mentioned, and has at all times since it was engaged in business in the State of Missouri continually had an outstanding liability on every day during said period for unexpired li-[fol. 537] ability extending into the future by contracts theretofore entered into, and that to reject said liabilities from consideration is arbitrary, unreasonable and unconstitutional, and, if applied to it, the plaintiff, as the superintendent is required by said void laws to do, in determining the propriety of the increase proposed, the said Section 6274, and the said Section 6283 (providing the rules and measures of his duties and his proposed action in passing upon the increase so by the plaintiff made) deprive it, the plaintiff, of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(f) Said statute, by Section 6283, purports to authorize and require defendant, superintendent, to take action respecting rates to be charged by this plaintiff in Missouri, regardless of whether this plaintiff's underwriting experience in Missouri has shown or is showing a profit or loss, but solely in the event that the result of the earnings in Missouri of all stock fire insurance companies for five (5) years next preceding defendant's investigation (considering the experience of all of them in the aggregate) shows that there has been profit of all companies in Missouri in the aggregate in excess of what is reasonable; and so the power to reduce this plaintiff's rates is made dependent, not upon this plaintiff's underwriting experience, but upon the experience in underwriting and otherwise of other companies, competitors of plaintiff, in [fol. 538] which plaintiff has no interest and over which plaintiff has no control. In so providing, said statute applied to plaintiff as respects increase effective June 1, 1930, confiscates and deprives this plaintiff of its property

without due process of law, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States and of Section 30 of Article II of the Constitution of the State of Missouri.

(g) The business of fire insurance is a private business, and may be transacted by private persons in their individual capacity, or by unincorporated or incorporated companies. The amount of indemnity and the premium is a matter of private negotiation and agreement.

The business of insurance is a natural right, receiving no privilege from the state, is voluntarily entered into, and cannot be compelled.

The business of plaintiff is not a public business, is not affected with a public interest or so affected to such an extent as to empower the State of Missouri to regulate plaintiff's rate of charge for insurance to be written in Missouri as by said statutes provided. There is no constitutional power in the State of Missouri to fix the rates and charges for services rendered by it and control the internal management of it, and the exercise of such supposed power is a taking of private property for a public use, and deprives plaintiff of its property without due [fol. 539] process of law, and a denial of the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States, and of Section 30 of Article II of the Constitution of Missouri.

Said statute arbitrarily and unreasonably restrains and curtails and interferes with the right of the plaintiff, on the one hand, and its customers, the insured, on the other, to contract as to the rates to be charged by the former and paid by the latter for insurance written, and thereby deprives plaintiff of its liberty, property and right of contract without due process of law, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States, and of Section 30 of Article II of the Constitution of the State of Missouri.

(h) And the plaintiff further says that by the provisions of Section 6287 of the Statutes of Missouri, if the plaintiff proceed to collect and charge premiums in accordance with the increase so by it made and filed, and notice whereof was given the said defendant, superintendent, as provided in Section 6274, the defendants will pro-

ceed, unless restrained by this Honorable Court, to impose upon the plaintiff the penalties of said Section 6287, namely, will assert a violation of the provisions of the said statutes and the said defendant, Superintendent of the Insurance Department of the State of Missouri, will, if not restrained by this Honorable Court, revoke the license [fol. 540] of it the plaintiff, and its agents, in the State of Missouri, who are also subject to and have licenses from the State of Missouri; and in addition the defendant, the Attorney General of the State of Missouri, will assert and maintain that plaintiff and its agents were and are guilty of infraction of said statute, and will prosecute plaintiff and its said agents for misdemeanor, and cause to be imposed upon it and them by proceedings in the courts of Missouri, fines not exceeding five hundred dollars ($500.) for such offense, and will treat the issuance of each policy of the plaintiff as a distinct offense. And it, the plaintiff, says that it, the plaintiff, through its agents in the State of Missouri, issues many policies each day, and the said defendant, Attorney General of the State of Missouri, will assert and claim that said premium charges so exacted at increased rates are productive of a discrimination which he will assert is unlawful, and that the same is at a higher and greater rate than was theretofore exacted upon insurance of the same property against like hazards, and will proceed against the plaintiff and its agents for a fine, as provided by said statute, 'not to exceed $500.00'; and will proceed against the agents of the plaintiff in that behalf, and assert and prosecute in the courts of the state proceedings whereby said agents of the plaintiff will be imprisoned under the provisions of said statute providing under such circumstances for 'imprisonment in the county jail for a term not exceeding ninety [fol. 541] days,' and will in other cases proceed for both fine and imprisonment, as by said statute provided.

And it, the plaintiff, says that the penalty provisions of said statute are so extreme and great, and so out of proportion to any offense involved, and so designed and intended to prevent the plaintiff from asserting its lawful rights in charging and exacting premiums which justly it ought to be permitted to charge, that the plaintiff dare not, without protection of this Court, proceed to put its increase into effect and risk the severe and excessive penalties by said statute provided.

And it, the plaintiff, says that because of the disproportionate, excessive and unwarrantable nature and amount of said penalties, and because action of the plaintiff in proceeding to test and determine its rights by placing its increase in force without the protection of this Honorable Court, would involve the plaintiff's business in Missouri in ruin, and expose it to drastic and extreme penalties; that because of the extreme and excessive nature thereof, and because the action which the plaintiff proposes and intends to take under protection of this Court to put its said increase in force is not forbidden by any lawful act but forbidden only by the unconstitutional statutes aforesaid, namely, Section 6274 and Section 6283; now, therefore, the plaintiff says the said Section 6287 of the Statutes of Missouri as and if applied to plaintiff because of putting its said increase in force is unreasonable, arbitrary, unconstitutional and void, and deprives it, the plaintiff, [fol. 542] of its property and its liberty of contract without due process of law, in violation of the First Section of the Fourteenth Amendment of the Constitution of the United States.

(10) And plaintiff further says that by the terms of said Section 6311, Revised Statutes of Missouri, 1919, the institution of this suit in a federal court against a citizen of the state of Missouri is of itself declared by the said statute to create the duty of the Superintendent of the Insurance Department to forthwith revoke all authority to the plaintiff to do business in the state of Missouri and to debar it from again entering or being permitted to do business in the state at any time within five years from the date of said revocation.

And it, the plaintiff, says that said Section 6311 is null and void, and in contravention of Section 2 of Article III of the Constitution of the United States, providing for the extent of the judicial powers of the courts of the United States; wherefore it, the plaintiff, says that the said statute and the terms and provisions thereof, and the supposed power and duty, cast upon the Superintendent of the Insurance Department of Missouri by the said section of Missouri statutes, and the exercise of such power by the defendant, Superintendent, which he threatens to and will unconstitutionally exercise against plaintiff if not restrained and enjoined are, and each and all of them are, in contravention of the Constitution of the United [fol. 543] States and the rights of the plaintiff thereunder.

(11) The plaintiff further alleges that the business in which it is engaged is highly competitive and subject to great fluctuations, and that the volume of the business which the plaintiff may secure is greatly affected by changes in the value and price of commodities, materials and structures; and that the amount of insurance carried by persons insuring property is affected by the shifting of values; and the proportions and volume of the business written, subject to be acquired by the plaintiff, is affected by the number and power of its competitors; and that losses are gravely affected by the condition of general business and conditions of prosperity or otherwise, and the concentration of values; and it, the plaintiff, says that there has recently been a marked shrinkage in commodity prices and values, and an increase of the number of those engaged competitively in business with it, and a slackening of industry tending to demoralize and increase losses and lessen watchfulness of property owners, and a concentration of insured values in centers where insurable property exists; it, the plaintiff, says that the elements entering into consideration of the future are indicative of a less favorable experience of the plaintiff upon its business in Missouri for the future than in the past.

And it, the plaintiff, says that the five (5) year period prescribed by the Missouri Statute as a test period for ascertaining the probabilities of the future is a reasonable [fol. 544] term of past time whereby to estimate and undertake to determine probabilities for the future.

And it, the plaintiff, says that in the business of insurance capital is not employed in the business and invested therein in any such sense as capital is employed in commercial lines or by railroads or utilities; but plaintiff is required by law and does keep its capital separate and distinct, and in the nature of a guaranteee fund, and is prohibited by law from employing or using it in and about its business of paying losses and expenses, but that to the contrary employment of any part thereof in and about payment of losses or expenses, namely, in the conduct of its business of insurance, is regarded by law as impairing its capital and by so employing even a small amount of its capital it is debarred from doing business.

Wherefore, it, the plaintiff, does and has kept its capital, subscribed by its stockholders, separate and intact; and it, the plaintiff, says that a just and reasonable measure

for the ascertainment of profit or loss in the business in which the plaintiff is engaged is by the admeasurement thereof and distribution of its premium charges, by equitable distribution among policyholders, and exacting from them amounts designed to and practically producing an equality of charge, depending upon the hazards involved and the amounts insured, and to so affix rates and charges that in each of said classes, of fire insurance and of windstorm insurance, a level of rates be fixed, [fol. 545] designed to produce sufficient premium income earned during any period to meet incurred losses and expenses; and in addition, to produce a margin of profit of ten per cent. (10%) of such earned premiums, as a sum designed to provide a reasonable profit and to produce a margin enabling the plaintiff to meet exceptional and unusual calamities and losses.

And it, the plaintiff, says that the increase so by it made on December 30, 1929, and provided by such filing and subsequent filings to be effective June 1, 1930, is designed to and will produce less than such reasonable profit aforesaid, and the past experience (1924 to 1928 inclusive) of the plaintiff for five years in Missouri and the past experience of others engaged in like business in said state for the said period of five (5) years upon fire insurance, and upon windstorm insurance, and upon all insurance, was productive of an income materially less than such percentage of reasonable profit to which the plaintiff is entitled and will produce less than such reasonable profit with increases applied.

And it, the plaintiff, says that by its said increase, and filing of notice thereof, the plaintiff designated June 1, 1930, as the effective date of such increase (substituted for effective dates previously nominated), and request and demand was made upon the Superintendent of Insurance that 'your approval is requested at such reasonable time before that date as will permit the practical application of such rates.' And it, the plaintiff, says that the agents [fol. 546] of it, the plaintiff, are scattered in various parts of the state and notification must be sent to them sometime before their action is desired, if uniform and general compliance by all of them is to be had; and that it, the plaintiff, has awaited action of the Superintendent of the Insurance Department of the State of Missouri, and that on the day of the execution of this bill, the plaintiff has sent notification to its agents throughout the State of

Missouri to put said increase in effect on June 1, 1930; and that it was reasonably necessary that said notices should on this date go forward, if the same were to become and reasonably to be effective on June 1st.

And it, the plaintiff, says that on the day of the execution of this bill, the said defendant, superintendent, had in no wise made any order, or given any notice, or expressed approval or disapproval of the said increase; wherefore, the plaintiff says by his failure reasonably to express any disapproval he has thereby approved the said increase, or has wilfully, wrongfully and against the right of the plaintiff determined not to act in reasonable season upon the said notification and demand upon him.

(12) Plaintiff further states that it is not informed whether the Superintendent of Insurance is undertaking to ascertain in his inquiry, if he is making any inquiry, the amount of 'interest on unearned premium' in his consideration of the increase in question. Plaintiff states that [fol. 547] there is no interest earned on the plaintiff's liability for unearned premium and that such supposed item and element of income is not one proper for consideration in rate determination; but it, the plaintiff, says that unearned premium is set up on the accounts of plaintiff as a liability of the plaintiff and is represented by a balancing amount on its profit and loss accounts, in that an indivisible part of its assets, representative of such liability, may be said to be representative of the assets offsetting unearned premium liability so set up. Owing to the fact that such element is not segregated in the assets of insurance companies, that such assets are kept in large part in liquid and uninvested form and the amount that is invested shifts and changes from day to day, and the unearned premium shifts and increases or decreases with every premium acquired and every loss occurring and every policy cancelled, it is virturally impossible to calculate, or even to estimate with any decree of certainty, the supposed item of interest on unearned premium. Plaintiff says that unearned premium is not an amount owing to policyholders but a measure of services and indemnity contracted to be performed and furnished and not yet rendered and is entitled to be set up as a liability in a sense similar to that in which any other item not forming a just part of net surplus is to be set up out of surplus. Plaintiff states, however, for the in-

formation of the court in its consideration, that the in- [fol. 548] terest earnings on the assets offsetting unearned premiums did not in any of the periods mentioned, either as to the plaintiff or as to insurance companies in the aggregate, exceed in amount two per cent of the earned premiums but was a much smaller sum.

Plaintiff further states that plaintiff and other insurance companies doing business in Missouri have been required, by the Superintendent of Insurance, to report interest on unearned premiums during past period, and such companies have, in general, undertaken and attempted to comply with such demand; and plaintiff states that the same was not subject to calculation, and that many companies estimated or guessed the amount, and the same is in general regarded by those engaged in the business of insurance as a matter not capable of certain calculation or ascertainment or proper to be considered or calculated, and that if the same were to be regarded as an element of underwriting income, that the profit which plaintiff is entitled (including provision for unusual calamities) as it has above stated namely ten per cent of earned premium ought justly and properly to be increased and enhanced to the extent that 'interest on unearned premium' is also taken into account as supposed income. In other words, the plaintiff says that, in stating and asserting its appropriate income above outgo for profit and catastrophe charge as being ten per cent of the earned premium, plaintiff alleges that the same is an appropriate, [fol. 549] proper and reasonable balance, without any accounting, paying, or taking into account as income of any supposed item of interest on unearned premium and if 'interest on unearned premium' be treated as income, plaintiff is entitled to a profit of twelve per cent instead of ten per cent.

FOURTH.

Unless this Court grants the relief herein prayed for, and unless the plaintiff exacts and collects the increased rates, as aforesaid, and is protected against the action of the defendants and interference on their part with such collection on and after June 1, 1930, the plaintiff will sustain irreparable injury and damage, in that the plaintiff will on and after June 1, 1930 either be compelled to issue policies of insurance and conduct its business of fire insurance and windstorm insurance in Missouri at a finan-

cial loss to the plaintiff, and upon a rate of income inadequate to meet the expense of the conduct thereof, and without any reasonable profit and without any profit whatsoever on such business, or alternatively to cease the doing of such business in Missouri and thereby lose its agency contracts, agency plants, established business, maps, surveys, rating records and good-will aforesaid, and the entire value thereof, which rights and property of the plaintiff are of great pecuniary value. And upon knowledge of commencement this suit and upon gaining knowledge that plaintiff has directed its agents to put said increase in force on June 1, 1930 and if the plaintiff proceed [fol. 550] to collect, enforce and apply such increase, the defendant, Joseph B. Thompson, will, unless restrained, proceed to revoke the license of the plaintiff and of its agents in Missouri to do business in said state; and the defendants, said Superintendent, and said Attorney General, will institute and cause to be instituted, and the said Attorney General will prosecute, or cause to be prosecuted, criminal action against the plaintiff and its hundreds of agents in the state of Missouri; and it, the plaintiff, and its said agents, will be subjected to numerous prosecutions to recover many thousands of dollars in fines and penalties accumulating as against it, the plaintiff, in the sums of many thousands of dollars; and the agents of the plaintiff will be subjected to prosecutions and jail sentences, and the threat and fear of cancellation of licenses, and proceedings for fines and proceedings for imprisonment of the plaintiff's agents will operate to put them in great fear and will cause many of them to refrain from accepting, receiving and soliciting business for the plaintiff, as otherwise they would do.

And it, the plaintiff, says that the actual loss to it, the plaintiff, if the said increase in rates aforesaid be not put into effect and collected and the gains prevented as to it, the plaintiff, will, during each day of continuance of its business in the state of Missouri, cause a loss and a diminution, if interference with such increase be not enjoined, amounting to not less than fifty dollars each day that [fol. 551] plaintiff may be required to write its insurance at reduced or preexisting rates, free of such increase.

Par. 2. The defendants have threatened, and, unless restrained and enjoined by this Court, will take unlawful

and unconstitutional action against and interference with the business of the plaintiff in the following particulars:

Each defendant has asserted, and if not enjoined will assert and publish and state to the insuring public of Missouri, that the premium charges at the rates to which plaintiff has increased them and on and after June 1, 1930 proposes to exact and charge, namely, inclusive of the increase of sixteen and two-thirds per cent upon fire insurance and upon windstorm insurance, and which the plaintiff proposes to exact upon its said contracts of fire insurance and its contracts of windstorm insurance, are unlawful; and the defendants have asserted, and will assert and publish and declare to the insuring public of Missouri, that they need not pay, or contract to pay, the same to the plaintiff, whereby many persons will be induced to refuse and decline to take insurance with the plaintiff and to pay to the plaintiff premium charges which it may lawfully demand and will demand and exact upon insurances on properties in this state. And unless restrained and enjoined the defendants will bring or cause to be brought proceedings to enjoin or interfere with and otherwise hamper the collection by the plaintiff of such [fol. 552] premium charges, and will cause actions and proceedings to be brought against the plaintiff, against its officers, directors, employes and agents, in which said proceedings numerous and excessive fines and penalties prescribed by the laws of Missouri, for violation of the insurance laws of said state respecting rates, will be imposed, and each issuance of a policy by or on behalf of the plaintiff will be treated and asserted to be a separate violation of law, and each exaction of premium upon each policy of the plaintiff will be treated and asserted to be a separate and distinct offense against the law, subjecting the plaintiff and its agents to penalties, and each application of such increased rate will be treated and asserted to be a separate and distinct offense. And the defendants will bring, or cause to be brought, actions to impose fines upon the plaintiff and actions to impose fines and imprisonment upon agents and representatives of the plaintiff; and the defendant, the Superintendent of Insurance, will undertake revocation and cancellation of the license of the plaintiff and its agents; and the defendants, the said Superintendent and the said Attorney General, will bring or cause to be brought proceedings before the Superintendent of Insurance and before courts

of the state of Missouri for revocation and cancellation of the licenses of the plaintiff and its agents; and the defendant, the Attorney General, will prosecute such actions and proceedings or cause the same to be prosecuted. And unless restrained and enjoined the defendant, the [fol. 553] Superintendent of Insurance, will refuse renewal of licenses to the plaintiff and to its agents upon the expiration of such licenses, many of which said licenses will, in the near future, become the subject of annual renewal and have in past years been, from year to year, renewed. And by said threatened and proposed actions of the defendants, which said actions and each of them will be taken, instituted, prosecuted and sought to be imposed upon the plaintiff and its agents, will, and each of them will, be sought to be imposed because of the action of the plaintiff in so lawfully and justly increasing its rates and for bringing this suit in a federal court, and such proposed actions, and each of them, are violative of the lawful and constitutional rights of it, the plaintiff, and said actions, and each of them, so proposed and threatened to be made by the defendants, will be founded upon and based solely upon the unconstitutional statutes aforesaid and the unconstitutional provisions thereof. And by such proposed and threatened actions of the defendants, the plaintiff will be subjected to great and irreparable loss and damage, and it, the plaintiff, and its officers, employes and agents, and each of them, will be subjected to a multiplicity of suits, and such proposed and threatened actions and proceedings of the defendants would, and each of them as so threatened and proposed will, be a trespass by the defendants without any lawful or constitutional authority in law and under void and unconstitu- [fol. 554] tional laws, statutes and departmental proceedings. And the plaintiff says that the defendants do not, nor does either of them, have sufficient financial responsibility to answer adequately in the damages which the plaintiff would sustain by their said actions, and have not sufficient financial responsibility to meet and pay the damages which will be suffered by other stock fire insurance companies against whom such proposed and threatened actions will be simultaneously taken and had and thereby exhaust the financial responsibility of defendants. And it will be wholly impossible, adequately and legally, to measure the amount and extent of the damages of the plaintiff for such wrongs and such conduct

and actions of the defendant, and each and every of such proposed and threatened actions and proceedings will deprive the plaintiff of its property and its liberty of contract, without due process of law, and deny to it, the plaintiff, the equal protection of the laws guaranteed to it, the plaintiff, by the first section of the Fourteenth Amendment of the Constitution of the United States.

Plaintiff has no plain, adequate or complete remedy at law and no relief can be afforded to the plaintiff from the operation and effect of such arbitrary, confiscatory and unconstitutional actions and proceedings of the defendants, as so threatened and proposed to be had against the plaintiff and its property, save only in a federal court of equity, and unless such relief is granted the property of the plaintiff will be confiscated and it, the plaintiff, will suffer [fol. 555] irreparable loss and injury. Immediate and irreparable injury, loss, and damage will result to plaintiff unless a temporary restraining order is granted and unless the same is granted without notice and unless an interlocutory injunction is granted in this: that if the plaintiff should comply and conform with the demands and conform to the views of the said Superintendent of Insurance and on and after June 1, 1930 write its insurance upon fire and windstorm risks at the preexisting rates and without collecting, demanding and receiving increases so above mentioned, plaintiff will be entirely unable to collect, receive or demand the same thereafter; will be required to execute and carry out its contracts and the obligations thereof without receiving and collecting compensatory rates, namely, rates at the increased rate according to filing of December 30, 1929; and the plaintiff would be debarred from any relief because of the confiscatory, illegal and unconstitutional demands and burdens so sought to be imposed on the plaintiff by the defendant, Superintendent, and so imposed by the said unconstitutional statutes aforesaid. And if the said unlawful and unconstitutional demands and requirements of the Superintendent and the provisions of said unconstitutional statutes are imposed as against the plaintiff, the premiums representing the difference between the rates of premium so collected at the lower rate and the rates of premium which plaintiff is legally entitled to receive as aforesaid would be wholly [fol. 556] lost to the plaintiff and the plaintiff would be required to do business at a confiscatory and inadequate rate, causing a loss to it from day to day in the

state of Missouri, upon each of said classes, amounting to not less than twenty-five dollars each day upon each class, namely, fifty dollars each day upon fire and windstorm insurance, which would be irreparably lost to the plaintiff.

The temporary restraining order herein prayed for should be be granted by this Court without notice to the defendants, because immediate and irreparable injury and damage will result to plaintiff before notice can be served on said defendants and a hearing had in this:

If defendants receive advance notice of plaintiff's application for a temporary restraining order, the defendants will, before the hearing, have it within their power and they will proceed to enforce the said void and unconstitutional statutes and the provisions thereof against the plaintiff; and will institute a multiplicity of suits against the plaintiff on each of the grounds of supposed violations aforesaid; and will proceed to revoke the licenses of plaintiff, its agents and representatives, to do business in Missouri, on the alleged ground that plaintiff was proceeding in violation of the said statutes of the State of Missouri.

Wherefore, the premises considered, plaintiff prays:

Par 1: That subpoena may issue against the said Joseph [fol. 557] B. Thompson, Superintendent of the Insurance Department of the State of Missouri, and the said Stratton Shartel, Attorney General of the State of Missouri, who are made parties defendant hereto, to appear and they be required to make full and direct answer to this bill, but not under oath, answer under oath being hereby waived.

Par. 2: That it be ordered, adjudged and decreed:

(a) That Section 6274, Revised Statutes Missouri 1919, and Sec. 6283 Revised Statutes Missouri 1919, as amended in 1923, and Sec. 6287, Revised Statutes Missouri 1919 and Section 6311 Revised Statutes Missouri 1919 and each of them, is unconstitutional and void and contrary to and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and Section 30 of Article II of the Constitution of the State of Missouri and said Section 6311 is in violation of Section 2 Article III of the Constitution of the United States.

(b) That the failure, neglect and refusal of the said Joseph B. Thompson, Superintendent of the Insurance De-

partment of the State of Missouri, to grant and give an approval to the plaintiff of its increase of rates of sixteen and two-thirds per cent upon fire insurance rates, and of sixteen and two-thirds per cent increase upon windstorm insurance rates, and the action of the said Superintendent of Insurance in requiring the filing with him of said approval and the requirement that approval be had before [fol. 558] the said rate increase becomes effective, and his failure seasonably and reasonably to rule upon said increase, and each of his said actions, is, as against the plaintiff, unreasonably, confiscatory, unconstitutional and void, and that said acts, and each of them, and said omissions on his part, and each of them deprive it, the plaintiff, of its liberty of contract and deprive it of its property without due process of law, and deny to it, the plaintiff, the equal protection of the laws, in volation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and Section 30 of Article II of the Constitution of Missouri.

(c) That the proposed and threatened action of the defendants, and each of them, whereby they propose to subject the plaintiff, its directors, officers, agents, employes, or any of them, to actions for penalties or fines or imprisonment or revocation of licenses because of plaintiff's action in putting into force increases of December 30, 1929 effective June 1, 1930 or any action or proceeding designed to enforce against the plaintiff any of the said statutes in this paragraph (a) above recited because of pursuing said increase or because of bringing this action or any actions under and pursuant to or enforcement of them, or any of them, are in violation of the rights of the plaintiff under Section 1 of the Fourteenth Amendment to the Constitution of the United States and Section 30 of Article II of the Constitution of the state of Missouri, and deprive it, the plaintiff, of its liberty of contract and [fol. 559] of its property without due process of law, and deny to the plaintiff the equal protection of the laws.

Par. 3. That the Court make a temporary restraining order (without notice to the defendants if the Court be so advised), to be effective until the hearing upon plaintiff's application for an interlocutory injunction, and that upon hearing of application for an interlocutory injunction that an interlocutory injunction issue and that by the said temporary [restaining] order and that by the said order for interlocutory injunction the defendants, Joseph

B. Thompson, Superintendent of the Insurance Department of the State of Missouri, and Stratton Shartel, Attorney General of the State of Missouri, and each of them, and their deputies, attorneys, solicitors, agents, servants and representatives, and all other persons acting or claiming or assuming to act for or under the authority of said defendants, or either of them, and all other persons who now seek or attempt, or who shall hereafter seek or attempt, to interfere with or abridge the right of the plaintiff, or do any act in any wise militating against the right of the plaintiff on and after June 1, 1930 to collect, demand, receive, and retain premium charges upon fire insurance and premium charges upon windstorm insurance at the rates created and made by filing of December 30, 1930, namely; an increase upon each of said classes of sixteen and two-thirds per cent above the level of rates obtaining [fol. 560] prior to that time; and that the said defendants and the other persons aforesaid, acting, claiming or assuming to act for or under them, be restrained and enjoined from taking any proceedings whatever under Sec. 6274 or Sec. 6283 or Sec. 6287, Rev. St. of Mo., or any powers claimed or asserted thereunder, and from advising, instituting, prosecuting or aiding in any action, suit or proceeding, or otherwise to enforce the said statutes mentioned, or exercise or use the powers therein purported to be granted, or otherwise to act in derogation of the increase of rates initiated on December 30, 1929, and provided to be effective June 1, 1930; and be restrained and enjoined from so proceeding against the plaintiff or against any of its officers, agents or employes of the plaintiff, or against Missouri Inspection Bureau or its managers, which Bureau is an agency of the plaintiff, or from giving or enforcing any orders or directions to said Missouri Inspection Bureau in any wise calculated to enforce or make effective any directions or powers of said statutes aforesaid, or any powers asserted to exist by virtue of the laws of the state of Missouri affecting rates or premium charges of the plaintiff upon fire or windstorm insurance in derogation of the said filing and increase of rates aforementioned; and the said defendants and all others, as recited, acting under, for or through them, be restrained and enjoined from proceeding to recover from or to impose or enforce against the plaintiff or any of its officers, directors and United States managers, em- [fol. 561] ployees, attorneys in fact, agents, adjusters,

inspectors, rating bureaus, inspection bureaus or any other person in any wise representing the plaintiff, any fine, penalty, imprisonment, damages or demand for refusal or supposed refusal to obey, observe or comply with the statutes as respects any supposed duty of filing or securing the approval of the said increase, or from making any direction respecting application of said increase or from proceeding against the plaintiff, its agents or employees in any wise because of exaction on and after June 1, 1930 of premiums by the plaintiff at the said rate level resulting from the filing of December 30, 1929, to be effective June 1, 1930, or to proceed in any wise against the plaintiff or any of its representatives aforesaid because of the delivery, negotiation for or steps taken in the execution and delivery of policies specifying such rates, or in any wise to interfere with, advise, institute or prosecute or aid in any action, suit or proceeding to interfere with, restrain or prevent the plaintiff or any of its officers, agents or employes, from charging, receiving or collecting the rates of premium charged for insurance at the rates so established by the said rate increase and filing; and that the defendants be restrained and enjoined in any wise from proceeding under said Section 6287, Revised Statutes of Missouri, 1919, or from refusing to renew licenses of the plaintiff or any of its agents or representatives, or withholding such licenses upon the ground of any supposed violation by them, or any of them, of the said statutes, [fol. 562] or proceedings pursuant or under the same because of said rate increase of December 30, 1929, effective June 1, 1930, and from making any revocation of authority or any proceeding or action for revocation of license of plaintiff or any of its agents or withholding or refusing renewal because of plaintiff's action in bringing this suit in federal court. And plaintiff prays that if at any time hereafter the defendant the Superintendent of Insurance, shall make any order of approval or disapproval of the said rate increases, or either of them, that the plaintiff may have leave to amend its bill and state and set forth any action or purported action of the said Superintendent of Insurance in that behalf, and may amend its bill and its prayer for relief as the situation may then present; and that if the said Superintendent shall not make any order of approval or disapproval within such time as this court shall determine is a reasonable time

for action on his part (and the plaintiff says that such reasonable time has already elapsed), that the Court may decree and find that his said failure of action is a determination on his part not to act, and that plaintiff is entitled and warranted to maintain and keep in force its said increase without any requirement of any further approval so wrongfully withheld.

Plaintiff further prays that the interlocutory injunction above prayed for may issue against the defendants upon five days' notice in writing to defendants respectively and to the Honorable Henry S. Caulfield Governer of the [fol. 563] state of Missouri, of the intended application therefor, enjoining and restraining the defendants above prayed, pending the hearing of this cause and until the further order of this court, and that such hearing be had before a court constituted as by law in such cases prescribed; that temporary restraining order may issue as above prayed without notice, to be effective until the date to be set by the court for hearing of interlocutory injunction motion and may continue in effect until said hearing be had and determination had thereon; that upon a final hearing in this cause before a court constituted as provided by law, that said interlocutory injunction may be made permanent and that the Court grant to the plaintiff such other and further relief as to the court seem just and proper, and that the plaintiff recover of defendants its costs herein.

_____

Solicitor for Plaintiff.
231 S. LaSalle St.,
Chicago, Illinois.

E. R. Morrison,
of Counsel.
Scarritt Bldg.,
Kansas City, Mo.

[fol, 564] STATE OF _____
COUNTY OF _____ ss.

Paul W. Terry, of lawful age, being first duly sworn, upon his oath says: that he is agent in this behalf for the plaintiff in the above entitled cause and is authorized to and does make this affidavit in the plaintiff's behalf,

and that the facts stated in the above and foregoing bill are true.

.....

Subscribed and sworn to before me this ..... day of May, A. D. 1930.

.....
Notary Public within and for said County and State

My commission expires .....

Plaintiff's Exhibit 1.

December 30, 1929.

Honorable Joseph B. Thompson,
Superintendent of the Insurance Department of the State of Missouri.

Honorable Sir:

You are notified that the several insurance companies, and each and all of them, the names of which are hereto appended, have this day made changes of their rates, in writing, on their public rating records, maintained in the [fol. 565] office of Missouri Inspection Bureau to which they are subscribers, and hereby give you immediate notice of such changes.

Fire (and Lightning) and Windstorm Rates.

Such changes of rates upon the risks of fire (and lightning), and likewise upon windstorm insurance, are as follows:

An increase of 16 2/3 per cent above the rates now existing as created by filing made under protest, dated August 8, 1929, and filed with you on August 9, 1929.

There is transmitted to you herewith the separate experience of each stock fire insurance company doing business in the State of Missouri during the period 1924 to 1928, inclusive, stating separately the experience of each such company in the State of Missouri, upon .....

(a) Fire (and lightning);

(b) Windstorm;

(c) Hail;

(d) All other classes;

(e) Total.

Such tabulations contain in separate tables the following information:

Table 1. Written premiums;

Table 2. Paid losses;

Table 3. Paid expenses;

[fol. 566] Table 4. Balance as between written premiums and paid losses and expenses;

Table 5. Such balance with ten per cent reduction applied;

Table 6. Profit or loss upon basis of earned premiums and incurred losses and expenses;

Table 7. Same as Table 6, with ten per cent reduction applied.

The combined experience of the said several stock fire insurance companies for the same period of time and by classes, showing their experiences in the aggregate for the test period, is as follows:

(Excess of losses and expenses over premiums.)

	Fire (Lightning)	Windstorm	Hail	Total of Classes
Earned and Incurred basis	$6,290,555	$12,025,414	$100,011	$19,093,659
Written and paid basis	$1,729,804	$ 9,642,237	$ 98,503	$10,763,063
With 10% reduction applied:				
Earned and Incurred basis	$9,734,489	$12,746,789	$140,424	$23,295,381
Written and paid basis	$6,784,186	$10,381,613	$139,407	$16,597,725

HAIL RATES.

Hail insurance on growing crops is in a formative state and the amount of business transacted is relatively small. It is written by comparatively few companies. The hazard is great and the experience from which to judge its future [fol. 567] is limited.

The filing of hail rates hereto attached and marked 'A' is the schedule of rates at which such business has been written during the year 1929, except for proposed

five-season hail policy, which has not heretofore been written in the State of Missouri.

You are further notified that each and all of the changes mentioned will be effective February 1, 1930. Your approval is requested at such reasonable time before that date as will permit the practical application of such rates.

Yours very truly,

(Name of plaintiff attached)

Plaintiff's Exhibit 2.

April 25, 1930.

Hon. Joseph B. Thompson,
Superintendent of the Insurance Department,
of the State of Missouri.

Honorable Sir: --

Of date December 30, 1929, notice of change of rates was given you, whereby you were notified that the several insurance companies, and each and all of them, the names of which were thereto appended, had on that day made changes of their rates in writing on their public rating records, maintained in the office of Missouri Inspection Bureau, to which they were subscribers, and thereby gave you immediate notice of such changes, to which they were subscribers, and thereby gave you immediate notice of such changes, to which notice you are referred as to the [fol. 568] changes so made and for the names of the several insurance companies thereto appended.

And by said notice you were further notified that each and all of the changes mentioned would be effective February 1, 1930, and your approval was requested at such reasonable time before that date as would permit the practical application of such rates.

Now, you are hereby notified that said notification and filing are and remain, in all respects, in force, except as to the effective date of said changes, which effective date has been put forward from time to time at your request, and is now put forward to June 1, 1930, in place of February 1, 1930.

Yours very truly,

Name of plaintiff appended.

Plaintiff's Exhibit 3.

WRITTEN AND PAID BASIS YEAR 1929.

	Fire	Windstorm	Hail and all other	Total
Written Premiums	$	$	$	$
Paid Losses	$	$	$	$
Paid Expenses	$	$	$	$
Overplus or Deficiency.	$	$	$	$

[fol. 569]

EARNED AND INCURRED BASIS YEAR 1929.

	Fire	Windstorm	Hail and all other.	Total
Earned Premiums	$	$	$	$
Incurred Losses and Expenses	$	$	$	$
Underwriting Loss.	$	$	$	$

(Order Convening Three-Judge Court.)

(No such Order is found in the files and no record reference thereto appears in any record of the Court.)

[fol. 570] (Amendment to Bill in Equity.)

(The Amendment to Bill in Equity in Cause No. 270 has been lost, but the following is a typical Amendment to Bill in Equity in the litigation in question:)

"In the District Court of the United States for the Central Division of the Western District of Missouri ..... Insurance Company, a corporation, Plaintiff, vs. Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri, and Stratton Shartel, Attorney General of the State of Missouri, Defendants. Injunction.

(Amendment to Bill in Equity.)

Now comes the above plaintiff, ... Insurance Company, and by leave of Court first had and

obtained, to amend its said Bill of Complaint without prejudice to injunctional order heretofore made, and amends its Bill of Complaint as follows:

And the plaintiff amends its said Bill of Complaint by inserting at page 37 of said Bill and at the end of the Third [fol. 571] division of said Bill and immediately before the division of said Bill on said page appearing entitled 'Fourth,' at which it inserts the following:

And the plaintiff says that on the 28th day of May, 1930 and immediately after the filing of the original bill of complaint herein and on the same day, the Superintendent of the Insurance Department of the State of Missouri did make his certain order, direction and ruling, which was transmitted to and received by Missouri Inspection Bureau, agency of the plaintiff and other stock fire insurance companies doing business in the State of Missouri, and so by said Bureau received on May 29th, which said order, ruling and findings were and are in words and figures following:

"May 28, 1930

Messrs. Waterworth & Terry, Mgrs.
Missouri Inspection Bureau,
1330 Pierce Bldg.
St. Louis, Missouri

Gentlemen:

On December 30, 1929, as managers for the Missouri Inspection Bureau, you filed an application with the Superintendent of Insurance of Misouri on behalf of all companies represented by your Bureau, whose names were appended to your application for an increase on fire, lightning, windstorm and hail insurance rates of 16 2/3% above the rates now existing as created by filing made under protest dated August 8, 1929 and filed with the [fol. 572] Superintendent of Insurance of Missouri on August 9, 1929.

I find that the income of such companies from business in Missouri during the year 1924, 1925, 1926, 1927 and 1928, amounted to $115,428,623.00, and that the losses paid and expenses of said companies chargeable to said business, amounted to $110,672,997, and that said companies had a net profit during said period on the Missouri business of $4,755,626.00, and that the rates heretofore

charged and now existing for fire, lightning, windstorm and hail insurance in the State of Missouri are adequate and that the application of said companies for an increase of 16 2/3% in fire, lightning, windstorm and hail rates should be and is hereby denied.

Done at my office in the City of Jefferson, this 28th day of May, 1930.

Jos. B. Thompson
Superintendent of Insurance"

And the plaintiff says that the said Superintendent of the Insurance Department of the State of Missouri, in the making of his said findings and order aforesaid, did purport to and asserted and now asserts and claims that by his said ruling and order aforesaid he has disposed of and ruled upon said notice of increase and does not intend or design to make any further or other ruling or order as respects it, the plaintiff, or the said application of the plaintiff, but asserts and contends that he has by his said [fol. 573] order and direction ruled upon and passed upon the increase so by plaintiff made on December 30th, 1929, effective June 1st, 1930, and asserts and claims that he has thereby acted upon the same adversely to the said filing and as a supposed disapproval thereof. And it, the plaintiff, says that by said ruling and order of May 28th, 1930, and by the action of the defendant, the Superintendent of the Insurance Department of Missouri therein and thereby taken, and by his said supposed application to it, the plaintiff, of the provisions of Section 6274 of Revised Statutes of Missouri, and by his purported and pretended construction and application of said section, and by his construction and pretended application of the provisions of Section 6283 of Revised Statutes of Missouri to it, the plaintiff, and its said filing of said increase, the defendant, the Superintendent, has infringed upon the constitutional and lawful rights of the plaintiff in particulars following:

(1) Although its said rate change and increase was by the plaintiff made severally and its several experience delivered to and shown to him, the said defendant, and was so severally made to him as respects fire insurance rates upon which an increase of sixteen and two-thirds per cent (16 2/3%) was made, and severally as to wind-

storm insurance upon which an increase of sixteen and two-thirds per cent (16 2/3%) was made, and although [fol. 574] the experience of it, the plaintiff, upon its business of fire insurance, and its experience upon windstorm insurance, and its experience upon its business of all classes were to the said defendant disclosed and submitted, together with said notice of said rate changes, yet he, the said defendant has not by his said order or ruling of May 28th, 1930, in anywise found that the experience of it, the plaintiff, upon its business of fire insurance was otherwise or different than by it so filed, or that its experience as respects windstorm was otherwise or different than by it so filed, or that in the said filing of experience there was any error, misapprehension or inaccuracy. And he, the said defendant has in nowise found that the combined experience of all stock companies doing business in the state, upon their business of fire insurance was different or otherwise than so with him filed and to him presented, together with said notice of change and increase in rates, either as respects fire insurance or windstorm insurance, nor hath he, the said defendant, in anywise found or determined that there was any fault, inaccuracy, error or other defect in the filing of experience with him made as respects either individual experience of the plaintiff in said classes or the experience of all stock companies in Missouri upon such classes. And the plaintiff further says that he, the said defendant, had no hearing, nor did he give any notice of hearing unto it, the plaintiff, or any opportunity to be heard, [not] was [fol. 575] there any evidence of any kind to him presented or heard by him or in anywise before him for consideration excepting the said filings of experience so with him made by Missouri Inspection Bureau as aforesaid.

Yet, nevertheless, he, the said defendant, has undertaken to, and by his said order has construed and applied the said statutes of the State of Missouri, namely, Section 6274 and Section 6283, as warranting him, the said defendant, in withholding and refusing his approval and denying and refusing increase and change of rates by plaintiff made upon its public rating record in the office of Missouri Inspection Bureau, whereof notice was immediately given to him as aforesaid, and that he, the defendant was by said statutes, as by him construed and so applied to the plaintiff, warranted in so doing, without

any evidence to in anywise support or sustain the findings so by him made. And plaintiff says that there was no evidence in anywise presented, heard, or before the said Superintendent of the said supposed "income of 'such companies" by him therein found to be $115,428,623.00 nor any evidence that "the losses paid and expenses of said companies chargeable to said business" amounted to $110,672,997.00 or that the said companies "had a net profit during said period of the Missouri business of $4,755,626.00", nor was there any evidence that the rates now existing or as by the said Superintendent found adequate upon fire [fol. 576] insurance or adequate upon windstorm insurance, or that the said companies had a profit in the said sum supposed or in any sum, nor was there any evidence in anywise warranting the finding that the said increase should be denied. And it, the plaintiff, says that he, the said defendant construed and applied the said statutes as warranting and entitling him and authorizing him to, and he did proceed upon the assumption that he might deny and refuse the said increases so by the plaintiff made, and withhold and deny approval thereof, without in anywise giving any consideration to the experience of it, the plaintiff, in said state, or without in anywise weighing or considering the confiscatory effect upon it, the plaintiff, of withholding and denial of his said approval. And he, the said defendant, has withheld and denied his approval of said respective increases and rate changes so by it, the plaintiff, made and whereof notice was so given to him, without in anywise considering or weighing, and refusing to weigh and consider the fact, which the plaintiff asserts, that the same was confiscatory as to the plaintiff.

Wherefore, it, the plaintiff, says that the said order and findings of the Superintendent of Missouri, and each and every of them, and the said Section 6274, Revised Statutes of Missouri, 1919, and the said Section 6283, Revised Statutes of Missouri, 1919, as amended in 1923, and each of said sections as so by the said defendant construed, [fol. 577] and each of said sections as so by him unto the plaintiff applied, and his said order and disapproval or denial of increase pursuant to said statutes so made, as aforesaid, are, and each of said sections and the same as so construed and applied, and the said order or direction and findings therein as aforesaid, deprive it, the plaintiff

of its property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(2) And it, the plaintiff, says that, together with its notice to the Superintendent made of the said rate change upon his public records by it so made upon December 20th, 1929, it, the plaintiff, did deliver and transmit to the said Superintendent of Insurance, together with its notice of said rate change immediately to him given, the several experience of it, the plaintiff, upon fire and upon windstorm insurance in the State of Missouri, for the period 1924 to 1928, inclusive, year by year, and in total, upon each of such classes, for the said five years, which filings so made are still in the possession of the defendant, and disclose and show that it, the plaintiff, did business in the state during said period upon each of said classes at a loss and with no profit whatsoever to the plaintiff upon said respective classes, and did file said separate figures with him, the said defendant, on the basis of written premiums and paid losses and expenses, and also on the basis of [fol. 578] earned premiums and incurred losses and expenses. And it, the plaintiff, says that the said filing with him so made disclosed the plaintiff did business on each of said classes without any profit during said period, and that, with the said change or rate increase, was not creative of any undue or unreasonable profit as applied to said experience. And it, the plaintiff, says that in truth and in fact it would have less than the reasonable profit upon its said business upon each of said classes and upon the whole of its business in said state, with said rate change and increase applied, but the defendant, the said Superintendent, to in anywise weigh or consider the experience of the plaintiff upon either fire insurance or upon windstorm insurance, or upon all classes of business upon any basis whatsoever, wholly failed, neglected and refused, and still fails, neglects and refuses, and to the contrary asserts and claims that he is warranted by the said statutes, namely, Section 6274, Revised Statutes of Missouri, 1919, and Section 6283, Revised Statutes of Missouri, 1919, as amended in 1923, from in anywise considering the experience of the plaintiff either upon fire insurance or upon windstorm insurance, or upon all classes of business, but that he, the said defendant, is warranted in denying and disapproving any increase solely and ex-

clusively upon consideration of some kind of aggregate experience of all companies in the state, without regard to or consideration of the individual experience of it, the [fol. 579] plaintiff, upon said classes or upon its whole business. And it, the plaintiff, says that the defendant, in his said order, which he, the said defendant, regards and designs and intends to be a final determination as respects the plaintiff, did not consider or in anywise weigh the experience of the plaintiff in anywise, either upon its business of fire insurance, or upon its business of windstorm insurance, or upon its business of insurance on all classes in the State of Missouri, but asserts and claims and did by his said order assert and claim that by the said statutes he is in nowise empowered to, or authorized to, or required to approve or consider or weigh the propriety of increase as respects it, the plaintiff, but that it, the plaintiff, is bound to conform to and abide by his said disapproval and denial of said increase and to write its said business of fire insurance and of windstorm insurance at rates obtaining prior to December 30th, 1929, and upon which the plaintiff had no balance of profit above outgo in any amount, and upon which it would receive no return whatever in the future, but has and would conduct said business at a loss to the plaintiff. And he, the said Superintendent, asserts and claims, and by his order of May 28th asserts and claims, that the plaintiff is bound to abide by his said denial of increase and to write said business of fire insurance and windstorm insurance at a loss and without any profit whatever, and that al- [fol. 580] though the said increase is and would be reasonable upon a consideration of experience of the plaintiff and upon consideration of the experience of the plaintiff weighed with the experience of other companies doing like business in Missouri, yet the plaintiff should be and may be compelled to do its business without any return whatsoever for the writing of fire insurance or windstorm insurance, because supposed earnings of other insurance companies, competitors of it, the plaintiff, and over whom the plaintiff has no power or control, disclose that the competitors of it, the plaintiff, or some one or more of them have made a supposed profit in the state.

And it, the plaintiff, says that the said order and ruling of the said defendant, the Superintendent of Insurance, of date May 28th, 1930, and his said denial and withholding

of approval of the rate increase upon fire insurance and windstorm as thereby made, and said Section 6274 of the Revised Statutes of Missouri requiring and imposing a supposed requirement of approval of the said Superintendent upon rate changes productive of an increase, and said Section 6283, Revised Statutes, as amended, providing the matters to be considered upon rate changes and the rules and conduct to govern the Superintendent in consideration thereof, and each of said sections of the said statutes and the said rate order purporting and pretending to construe the same and undertaking to apply the same to it, the [fol. 581] plaintiff, as the said respective sections of the statutes and each of them are so applied to the plaintiff, without evidence and confiscatory of the property of it, the plaintiff, and without in anywise weighing, considering or giving any weight to the confiscatory effect of said action, as said sections of the statute and each of them is by the said rate order of May 28th, 1930 applied to it, the plaintiff, and as so construed and as applied to it, the plaintiff, by the said rate order, deprive it, the plaintiff, of its property without due process of law, and operate to confiscate its established business and property in violation of the First Section of the Fourteenth Amendment to the Constitution of the United States.

(3) Although it, the plaintiff, did separately show and disclose and file with the Superintendent, with its said notice aforesaid, its separate experience on fire insurance and upon windstorm insurance during the period of five years 1924 to 1928, both inclusive, and although he, the said Superintendent, in nowise found the same in anywise erroneous, false or incorrect, and although it, the plaintiff, did state and file with him its experience for said period upon its business in the State of Missouri, which was not by said Superintendent found to be in anywise erroneous, false or incorrect, yet he, the said Superintendent, in his said order, did not consider, weigh or determine the adequacy or inadequacy of the rates of it, the plaintiff, as so [fol. 582] disclosed, as respects either fire or windstorm insurance, and had no evidence of any kind in anywise controverting the same, nor did he consider or weigh evidence in anywise militating against or contrary to or in anywise different from the said experience so filed with him.

Wherefore, the plaintiff says that by the said act of the Superintendent in so denying and witholding his ap-

proval from said increase and asserting and insisting, as he, the said Superintendent, does, that the plaintiff is not warranted in changing and receiving the said changed and increased rates, said Superintendent does so insist, and has so ordered without any evidence and arbitrarily and by false and improper standards, namely, by the sole standard of combined supposed experience of stock companies in Missouri, and upon a consideration of erroneous elements of supposed income and outgo whereby it, the plaintiff, says it is deprived of its property without due process of law in violation of the First Section of the Fourteenth Amendment to the Constitution of the United States.

(4) And it, the plaintiff, says that it, the plaintiff, did, together with its said notice to the Superintendent, file with him not only its own experience, but the combined experience of all stock companies in the State of Missouri for the period of five years aforesaid upon both their pay basis and upon earned and incurred basis. And it, the plaintiff, says that the said Superintendent, without any- [fol. 583] wise finding that the premiums so disclosed and shown to him were in anywise erroneous or mistaken or in anywise in error, did nevertheless make a finding of supposed income of stock fire insurance companies in Missouri during said period of five years and namely, did find that their income in the State of Missouri for the said period was $115,428,623.00. And it, the plaintiff, says that in finding that the same was the income of such companies, he, the said Superintendent, did take into account and consider as supposed income certain items and elements in nowise a part of the income of stock fire insurance companies in the said State of Missouri, lawful for him to so take into account, and did include in said figures, so by him found, items and elements in nowise income of the said companies in the State of Missouri, namely, did include therein certain earnings upon investments of stock fire insurance companies foreign to the State of Missouri, the exact nature of such computation and inclusion the plaintiff cannot with more particularity assert and allege, but is informed and believes and therefore states the fact to be that the same was inclusive of certain earnings upon assets contributed to and belonging to stockholders and certain supposed earnings from investments and sale of assets and interest earnings and divers other supposed earnings of stock fire insurance companies from investment of funds in nowise made in the State of Missouri or

[fol. 584] attributable to or arising upon or out of the conduct of the business of insurance of said companies in Missouri but were investments made by competitors of it, the plaintiff, and earnings by them made or supposed to be made at their home offices in foreign states and countries in nowise relating to or arising out of or lawfully attributable to the conduct of their business of insurance in the State of Missouri and in nowise inuring to the benefit of or any profits or earnings of it, the plaintiff, or within its control or management, nor within the jurisdiction of said state nor made or there arising.

Wherefore, the plaintiff says that in so purporting to follow the directions of Section 6283, Revised Statutes of Missouri, and in so purporting to employ and use the same as a guide for the action of him, the said Superintendent, in performing the supposed powers of him, the said Superintendent, respecting approval of rates as provided in Section 6274, Revised Statutes of Missouri, and in so construing said Section 6274, and said Section 6283, and in so applying the same to it, the plaintiff, and to its said rate change aforesaid, and in and by his said rate order of May 28th, 1930, and in and by his said styled denial of application for increase, the constitutional rights of it, the plaintiff, have been infringed upon, and said actions and each of them, and the said finding respecting the supposed income of companies from business in Missouri, and the said order of May 28th, 1930, and the said Section 6274 [fol. 585] and Section 6283, Revised Statutes of Missouri thereby and by the threatened exercise of the power of him, the defendant Superintendent, in seeking and undertaking to enforce the same against it, the plaintiff, deprive it, the plaintiff, of its property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(5) And it, the plaintiff, says that in and by his said order and direction of May 28th, 1930, as aforesaid, the defendant Superintendent did find and declare that the "losses paid and expenses of said companies chargeable to said business amounted to $110,672,997.00". And it, the plaintiff, says that the said matters are particularly within the knowledge of him, the said defendant, so that it cannot with greater particularity set forth the facts respecting the same, but the plaintiff is informed and believes and, therefore, states the fact to be that in making his said finding of supposed losses paid and expenses

chargeable to the business, that he, the said defendant, did not include and take into account the losses paid and the expenses of it, the plaintiff, but ignored the same, and did not take into account the losses paid and expenses of stock fire insurance companies doing business in Missouri, either upon classes of fire insurance and windstorm insurance or upon the whole business, nor did he take [fol. 586] into account any losses or expenses, liability whereof was fixed and incurred and payable, but not in fact paid, nor did he take into account the expenses as the same were in fact had and expended in and about the legitimate conduct of said business, but rejected and excluded large sums which, in his arbitrary discretion, he did disallow and strike out from consideration, and used his untrammelled whim, and caprice, and without any authority or lawful ground so to do refused and excluded large elements of outgo as unwarrantable and not proper to be taken into account and, although he had before him no figures and no experience and had for consideration nothing except the said experience presented and filed with him by the plaintiff, as aforesaid, yet, without any evidence and by the said arbitrary method, as aforesaid, the Superintendent did enlarge and incorporate into income item large sums in nowise arising upon, or any income of stock fire insurance companies, upon their Missouri business, and excluded large sums from outgo properly and appropriately to be taken into account as outgo, and did arbitrarily and without any warrant decline to consider the experience severally as to fire insurance and as to windstorm insurance, but did consider the same grouped together and inclusive of still other classes and groups of insurance, the scope and extent of which the plaintiff has no specific information at this time, but expects to prove [fol. 587] upon the hearing. And it, the plaintiff, says that the said Superintendent asserts and claims that his actions, as aforesaid, and his said findings so aforesaid, and his said order of May 28th, 1930, as aforesaid, are and each of them is warranted and appropriate to be by him pursued under Section 6274 and Section 6283 of the Revised Statutes of Missouri, and it, the plaintiff, says that said findings and each of them, and the said order of May 28th, 1930, and the said Section 6274 and Section 6283, Revised Statutes of Missouri, as the same are written and appear upon the statute books of the State of Missouri, and as the same were and are so construed

by the said Superintendent, and as the same have been and are so applied to it, the plaintiff, by the said findings, and the said order of May 28th, 1930, infringe upon the constitutional rights of it, the plaintiff, and the threatened action of him, the said defendant in reliance upon and pursuant thereto, and each of his said threatened acts, deprive the plaintiff of its property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(6) And the plaintiff says that the only evidence in anywise before the said Superintendent upon the making of his said order of May 28th, 1930, aforesaid, was that by the plaintiff so filed with him, together with its notice of increase, as plaintiff has above alleged. And it, the plaintiff, says that the defendant Superintendent, in mak- [fol. 588] ing supposed findings of income and outgo in his said order contained varied from and differed from those by it, the plaintiff, so presented. And whereas, the plaintiff says that there was no evidence whatsoever otherwise before him than as so by the plaintiff filed, and no evidence, testimony, hearings, or notice of hearings, or any proceedings in anywise had enlarging, modifying, or in anywise disclosing or showing any errors or deficiencies in the said experience so to him, the defendant Superintendent presented, it, the plaintiff, says there was no evidence supporting or in anywise sustaining or tending in anywise to support or sustain his said findings of income and outgo as aforesaid.

Wherefore, the plaintiff says that by his said findings and his said order so made without evidence, his said findings and his said order are arbitrary, unsupported by evidence, and deprive the plaintiff of its property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(7) And the plaintiff says that in the making of his said order of May 28th, 1930, aforesaid, and his said findings therein contained, he, the said Superintendent, reached his said conclusions and made his said findings without any hearing in anywise granted to the plaintiff, or any hearing of any kind had or held, or any notice to the plaintiff of any hearing, or any opportunity to be heard, [fol. 589] and if he, the said Superintendent examined into, or inquired into, or resorted to any supposed informa-

tion in the making of his said findings, and in his said rate order, excepting the filing so by the plaintiff made, with its notice of increase, as in its original bill herein alleged, it, the plaintiff, had no opportunity to ascertain said sources or the propriety thereof, or the scope thereof, or to make any objection to the same, or the consideration thereof, or any opportunity to inquire into or object to the method or manner of adducing or reaching said supposed findings or results, or objecting to or inquiring into the sources of supposed information respecting the same. And it, the plaintiff, says that the said Superintendent, either had no evidence whatever on which to predicate his said findings and his said order and the same are figures and supposed findings as respects income and outgo purely conjectural and imaginative without any evidence whatever on which to base the same, or they were made and secured in the absence of the plaintiff and without any hearing to it, and without any opportunity to it to ascertain or learn the supposed sources, and at secret and ex parte hearings in which the plaintiff did not and could not particip- e. And it, the plaintiff, says that, in either event, its constitutional rights are infringed, and the said findings and the said order of May 28th, 1930, invade its constitutional rights, and that the said statutes, Sections [fol. 590] 6274 and 6283 of Revised Statutes of Missouri, pursuant to which the Superintendent claims his warrant for so proceeding and acting, in that the same make no provision for any notice or any hearing to the plaintiff, and permit and allowed disapproval of rates without any hearing or evidence, and the said statutes as so construed and as applied to the plaintiff by the said rate order and finding therein, and threats to enforce the said order as against the plaintiff, and each of said acts and actions deprive it, the plaintiff, of its property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(8) And the plaintiff further says that although it, the plaintiff, is by law entitled to a reasonable profit, and the said statute, namely, Section 6283 of Missouri Revised Statutes, has been by the Supreme Court of Missouri, the highest court of said state, construed and declared to mean that stock companies, whereof plaintiff is one, are entitled to a reasonable profit to eight per cent (8%) upon their written premiums, above their outgo, and although he, the said Superintendent, has made a

finding of income and outgo and found that stock companies in Missouri have received a sum greatly less than eight per cent (8%) upon their premium income as a profit and to meet extraordinary losses such as conflagrations, and although he, the said Superintendent, has by his said [fol. 591] findings found that a net profit of approximately half that amount only has been derived, and although he, the said Superintendent, has not found that any reasonably compensatory profit has been made or derived by the plaintiff or by stock companies in said state during the said test period, and although he has found a supposed profit of $4,755,626.00, he has in nowise found that any profit was made upon fire insurance, or that any profit was made upon windstorm insurance, or that the profit upon either of said classes was compensatory; nor has he in anywise found that the rates formerly existing were reasonable or that the said increase of December 30th, 1929, was unreasonable, or that the rate changes thereby created were unreasonable, but hath made supposed findings as respects fire, lightning, windstorm and hail insurance conglomerated and assembled as respects all companies, without any separate finding as to either or any of said classes, and hath found that the rates previously existing were adequate, although the same did not give to the plaintiff reasonable compensation, and are not found so to do.

Wherefore, plaintiff says that the said findings and the said order [or] May 28th, 1930, and the said statutes and acts of the public legislature of Missouri, namely, Section 6274 and Section 6283 of Revised Statutes of Missouri, which are asserted and claimed by the said defendant to warrant and authorize his said action, as said findings and said order are so made as aforesaid, and as said statutes [fol. 592] are written as aforesaid, and as the same are so construed by the Superintendent and by him applied as against the plaintiff, and each of said acts, findings, omissions of finding, and each of said legislative acts aforesaid, and the threats of enforcement against the plaintiff as aforesaid, deprive it, the plaintiff, of its property and liberty of contract without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(9) And the plaintiff says that the said statute, namely, Section 6274 Revised Statutes of Missouri, pursuant to which the supposed power of the Superintendent aforesaid is exercised, in nowise provides for any ap-

plication to him in case an increase is desired by fire insurance companies, and it, the plaintiff, was under no obligation under said statute to make any application to the Superintendent if it desired an increase, nor was he in anywise empowered by said statute to grant or withhold any increase, nor was the making of increases in anywise to him entrusted by said statute, nor was there any other law of the State of Missouri in anywise giving to the said defendant Superintendent the supposed power of granting or denying or requiring applications for increase of fire insurance or windstorm insurance rates, nor did it, the plaintiff, make any such application to him, the said defendant, but by the terms of the said statute, it, the plaintiff, was warranted and entitled if it was [fol. 593] desirous of making an increase, of its making said increase by change of rates upon its public records and giving notice immediately to the Superintendent that said change had been made and deferring the effectiveness thereof for ten (10) days awaiting his approval, within which period of ten days after receipt of said notice, he was, by the terms of said statute, according to the terms thereof, empowered to approve or disapprove the rate change so made by the plaintiff upon its public records. And it, the plaintiff, says that he, the said defendant, the Superintendent, has misconstrued his powers and assumed that he had the arbitrary and unqualified power to require applications for increases and to grant or withhold at his whim and caprice, without any guide or rule, and thereby he, the defendant, so acting upon his said misconstruction and misapprehension of the said law, purported to deny an application for increase of the plaintiff upon his said whim and caprice, whereby and by asserting and taking unto himself power in nowise by law to him entrusted, he, the said Superintendent, by said action, did unlawfully invade the rights of it, the plaintiff, and his said actions, as stated in his ruling of May 28th, 1930, are null and void and of no effect and should be so declared.

(10) And the plaintiff says that by the provisions of the laws of the State of Missouri in the case of a change of rates of an insurance company in the State of Missouri, the same are governed, so far as any power of governing [fol. 594] the same is granted, by Section 6274 Revised Statutes of Missouri. And the plaintiff says that the defendant, asserting and claiming said unconstitutional and

unlawful powers to reside in him, did, by his said rate order of May 28th, 1930, assume and take unto himself powers by him asserted to arise under Section 6283 Revised Statutes of Missouri, as amended, as governing and [controling] his action in granting or withholding approval of a rate change by way of increase, as prescribed in Section 6274. And the plaintiff says that, in so applying Section 6274, and in so construing the same as governed by and regulated by the directions of Section 6283 applicable to reductions in rates made upon consideration of all the business of stock companies in the state, the defendant, the Superintendent, did, pursuant to such construction, undertake to apply his supposed and assumed powers by his order of May 28th, 1930, above set forth. And it, the plaintiff, says that Section 6283 contemplates and involves cases of reductions of rate by general order of reduction based upon the experience of stock insurance companies upon their entire business in the state and contemplates and provides for the consideration of aggregate experience of all stock companies in the State, and that construing said Section 6283 as applicable to the increase of the separate rates of the plaintiff upon separate classes of fire insurance and windstorm insurance as to [fol. 595] each of such classes severally, and in undertaking to measure and determine the propriety of such rates by consideration of the aggregate experience of all stock companies upon all their business in the state, the said Superintendent, so undertaking to do and following such supposed arbitrary and unreasonable standard, did not weigh or find or in anywise determine whether the said rate change so by the plaintiff made upon its public records on December 30th, 1929, was warranted by its experience, or whether the said change and increase of its rates upon fire insurance were warranted by the aggregate of all stock fire insurance companies doing business in the state upon their business of fire insurance, and in no way weighed or considered or determined the propriety of the said increase upon windstorm rates of it, the plaintiff, by taking into account or weighing or considering the experience of it, the plaintiff, or the experience of stock companies in the aggregate in said state upon windstorm insurance. And he, the said Superintendent, did not consider or in anywise weigh or determine the confiscatory effect of existing rates without the application of said increase, or the compensatory or

noncompensatory character of the same as so increased upon such classes of insurance, namely, windstorm and fire insurance. And it, the plaintiff, says that the plaintiff has conducted both such classes of insurance and each of them at confiscatory and inadequate rates and with said increase applied will have no more than a rea- [fol. 596] sonable rate for the conduct of said business, and that stock fire insurance companies in the aggregate have conducted said respective classes of insurance at a loss during said test period of five years, and have conducted each such class at a loss, and with such increase applied would have no more than a reasonable profit.

Wherefore, the plaintiff says that by his said denial of increase and by so weighing and applying improper, confiscatory, unlawful and unconstitutional and arbitrary measures and standards, and by construing said statutes as warranting him in so doing, and by applying said Section 6274 and said Section 6283 to the plaintiff upon such unlawful and unconstitutional construction and applying the same so as to confiscate and destroy the property of it, the plaintiff, the said statutes, as so construed and applied, and the said rate order of May 28th, 1930, and the findings and considerations entering into and forming the basis thereof as so recited, and each of said acts and actions deprive it, the plaintiff, of its property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(11). And it, the plaintiff, says that before the making of the said rate order of May 28th, 1930, above set forth, and that earlier on said May 28th, 1930, and in the forenoon of said day, the plaintiff did send notification to each of its agents in the State of Missouri of the rate change so [fol. 597] made and said increase, and it, the plaintiff, says that said agents are spread through the state, that May 30th, Memorial Day, was a holiday, and that May 31st was a short day, and one upon which many agents would be absent from their offices, because of the day preceding and the day following the same being holidays. And it, the plaintiff, says that it withheld the sending of said notice until the latest practicable moment, to make said rate order effective June 1st, 1930, and that the defendant Superintendent had, by his inaction and failure to act and failure to make any request for any extension of time, indicated that he had no intention of acting upon the notice

to him or making any approval or disapproval within a reasonable time before the effective date, so that the same might on the effective date thereof be made in fact effective.'

And now comes the plaintiff, and by like leave of Court, further amends its said Bill by inserting immediately after the last word on Page 45 of its Bill and after the words there appearing 'and that plaintiff is entitled and warranted to maintain and keep in force its said increase without any requirement of any further approval so wrongfully withheld' the words and figures following:

'That the said Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri, and [fol. 598] Stratton Shartel, Attorney General of the State of Missouri, and each of them, and their deputies, attorneys, solicitors, agents, servants and representatives, and all other persons acting or claiming or assuming to act for or under the authority of said defendants, or either of them, and all other persons who now seek or attempt or who shall hereafter seek or attempt to interfere with or abridge the right of the plaintiff, or do any act in anywise militating against the right of the plainfiff, on or after June 1st, 1930, to collect, demand, receive or retain premium charges upon fire insurance and premium charges upon windstorm insurance at the rates created and made by filing of December 30th, 1929, be restrained and enjoined from taking any proceedings whatever to enforce or make effective against the plaintiff a certain order of the Superintendent of the Insurance Department of the State of Missouri, dated May 28th, 1930, withholding and denying approval of rate increase of sixteen and two-thirds per cent (16 2/3%) on fire and windstorm rates of insurance, and be restrained and enjoined from any actions for penalty, imprisonment, revocation of license of it, the plaintiff, or its agents, or withholding of licenses or renewals of licenses because of supposed violation, failure or refusal of plaintiff to conform with, or abide by, or observe the directions of said order and direc-

tion of the Superintendent of the Insurance Department of Missouri of date May 28th, 1930, or failure or refusal of the plaintiff to observe, recognize or conform to Section [fol. 599] 6274, Revised Statutes of Missouri, 1919, or Section 6283, Revised Statutes of Missouri, 1919, as amended in 1923, as the same are construed and undertaken to be applied to the plaintiff by the said order of May 28th, 1930, by the Superintendent of Insurance so promulgated.'

Solicitor for Plaintiff,
231 South LaSalle Street,
Chicago, Illinois.

E. R. Morrison,
of Counsel,
Scarritt Bldg.,
Kansas City, Mo.

STATE OF MISSOURI,
COUNTY OF JACKSON ss.

_____, of lawful age, being first duly sworn, upon his oath says that he is Agent in this behalf for the plaintiff in the above entitled cause, and is authorized to and does make this affidavit in the plaintiff's behalf, and that the facts stated in the above and foregoing Bill and this Amendment thereto are true.

Subscribed and sworn to before me, this __ day of _____, A. D. 1930

Notary Public within and for said County and State.

My commission expires _____."

[fol. 600] (Amended and Supplemental Bill in Equity.)

(The original of the Amended and Supplemental Bill in Equity in Cause No. 270 has been lost, but the following is a true copy of the Amended and Supplemental Bill in Equity filed by the American Insurance Company in the litigation in question:)

"In the District Court of the United States for the Central Division, of the Western District, of Missouri. American Insurance Company, a corporation, Plaintiff, vs. Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri, and Stratton Shartel, Attorney General of the State of Missouri, Defendants. No. 270 Injunction.

(Amended and Supplemental Bill in Equity.)

Now comes the above named plaintiff, American Insurance Company, and in this its amended bill and supplemental bill of complaint for cause of action against defendant, Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri and Stratton Shartel, Attorney General of the State of Missouri, states:

[fol. 601] FIRST:

Plaintiff is now, and at the time of filing of the original bill herein was, and at all times hereinafter mentioned was a corporation of a state other than the State of Missouri and was and is a citizen of and organized and existing under any by virtue of the laws of the State of New Jersey, as a stock fire insurance company; plaintiff was at all times herein mentioned and now is authorized by its charter to do a business of fire (lightning), hail, windstorm and allied lines of insurance usually done by fire insurance companies; and it, the plaintiff, is a citizen and a resident of the state last above named.

Defendant, Joseph B. Thompson, is now and at all said times was a citizen of the State of Missouri, residing in the Central Division of the Western District of Missouri, and said defendant is and was at all times herein mentioned the duly appointed, qualified and acting Superintendent of the Insurance Department of the State of Missouri.

Defendant, Stratton Shartel, is and at all said times was Attorney General of the State of Missouri and as such Attorney General is the chief law enforcing officer of said State, having supervision of the enforcement of the laws on behalf of the State against any person or corporation who may be claimed to have violated the law and, generally, to enforce the laws of said commonwealth. Said Stratton Shartel is and at all said times was a citizen [fol. 602] of the State of Missouri and resident of the Central Division of the Western District of Missouri.

SECOND:

The Court's jurisdiction depends upon the following grounds:

This is a suit of a civil nature in equity. The matter in controversy is of the value of $5000 and exceeds, exclusive of interest and costs, the sum or value of $3000; and

(1) arises under the Constitution of the United States, namely, the powers asserted and claimed by the defendant, the Superintendent of The Insurance, Department of Missouri (hereinafter specifically set forth), and the acts by him done, and the order by him made and the failure and refusal of action whereof he is guilty (hereinafter more asserted in detail) applied as against the plaintiff are asserted by plaintiff to be violative of the first section of the Fourteenth Amendment of the Constitution of the United States, in that the same (a) deny to plaintiff the equal protection of the laws; (b) deprive the plaintiff of its property and liberty without due process of law;

(2) arises under the Constitution of the United States, in that section 6274 and section 6287 and section 6311, Revised Statutes of Missouri, 1919, and section 6283, Revised Statutes of Missouri, 1919, as amended (1927 Annotated Supplement to Missouri Revised Statutes 1919 -- Laws of Missouri 1923) p. 234; (which said section 6274 and 6283 are the supposed laws by virtue of which the authority [fol. 603] of regulation of rates of insurance by the said Joseph B. Thompson, in his actions and omissions hereinafter recited were and are asserted, and section 6287 is the penalty statute under which the defendant, Stratton Shartel, threatens to proceed and will proceed if not enjoined) are void and violative of the first section of the Fourteenth Amendment of the Constitution of the

United States, in that they and each of them (a) deny to plaintiff the equal protection of the laws; (b), deprive the plaintiff of its property and liberty of contract without due process of law; and section 6311 Revised Statutes of Missouri 1919 under which threat of revocation of licenses for bringing this suit in federal court is asserted, is in contravention of Section 2, Article III, of the Constitution of the United States.

(3) is between citizens of different states, the defendants, and each of them, being citizens of the State of Missouri, and the plaintiff being a citizen of New Jersey.

THIRD:

The facts are as follows:

(1) Plaintiff is and at all time herein mentioned was a stock fire insurance company engaged in the business of fire (lightning), hail and windstorm insurance and doing in addition allied lines of insurance authorized by its charter. Said plaintiff was at all times herein mentioned and now is authorized and licensed to do and doing said business in the State of Missouri, by license issuing [fol. 604] (and annually renewed) from the constituted authorities of said state, namely, from the Superintendent of the Insurance Department of the State of Missouri.

In order to conduct its business in the State of Missouri, plaintiff has been obliged to establish, and did, upon its entry upon the doing of business in said state, in the year 1873, establish local agencies in the various cities and towns in the state, which agencies so established are of great value. Without such established agencies it would be impossible for the plaintiff to conduct its business of insurance in the State of Missouri, and said established agency plants of the plaintiff are of great value to the plaintiff, namely, of the value of five thousand dollars ($5,000).

Plaintiff has at great cost and expense made, and caused to be made, elaborate surveys, and from such surveys compiled maps, or caused the same to be compiled, which are in some part furnished and supplied to the agents of the plaintiff, and in some part copies retained in its supervisory office, and used and employed in the writing of insurance in the State of Missouri and in locating and ascertaining the nature, character, and

detail of risks subject to insurance. Said maps and surveys are of a reasonable value in excess of the sum of one thousand dollars ($1,000).

In accordance with the requirements of Section 6270, Revised Statutes 1919, the plaintiff has compiled and does [fol. 605] now maintain in the State of Missouri a public rating record through medium of Missouri Inspection Bureau, including extensive maps, surveys and other data comprehending the result of inspection of many thousands of insurable property risks in said state, from which data and compilations and rates of premium applicable to such respective risks in this state may be ascertained upon the making of or application for insurance thereon. Such rating record includes general basis schedules and embodies basis rates, charges, terms, conditions, permits and standards, and such other data as may be necessary for the computation and promulgation of equitable rates and rules of practice. Such records show the forms and endorsements upon which each rate is predicated and show the changes of the rate to be made on account of the employment or omission from the insurance of said several forms or endorsements. Such rating records of the plaintiff are of value of more than three thousand dollars ($3,000).

(2) In December, 1929, and during all the time from January 1, 1924, to the present time, and at the time of the making and filing of increase on the part of the plaintiff hereinafter more specifically mentioned, and ever since that time, there were and now are in force certain public laws of the State of Missouri, more specifically described as follows: (Article VIII embraces sections 6270 to 6288, both inclusive.)

Section 6270, Revised Statutes Missouri 1919, requires every fire insurer, or other company insuring against the risk of loss by fire, lightning, hail or windstorm, to [fol. 606] maintain a public rating record, from which the rate of premium applicable to each risk in the state to be written by such insurer may be ascertained in advance. By such public law, such record is required to include general basic schedules, basic rates, charges, terms, conditions, permits and standards, and such other data necessary to the computation or promulgation of equitable rates and rules of procedure and showing the forms and endorsements upon which each rate is predicated;

and it, the plaintiff, did during all said time and still does, keep and maintain such rating record in the offices of Missouri Inspection Bureau in the said State and in its separate offices and agencies."

Section 6274 Revised Statutes of Missouri 1919, of said Statutes provides, among other things:

'All public rating records required to be maintained by this article, whether kept by insurers separately or actuarial bureaus, shall show the rate which said insurer proposes to charge and collect; but any insurer maintaining its own public rating record, or any actuarial bureau shall be permitted to change or lower rate or rates whenever it sees fit: Provided, that rates shall not be raised until at least ten days' notice has been given by the insurance company to the Superintendent of Insurance and his approval obtained; but in making a change it shall be required to make the change in writing on its public record, and to immediately give notice thereof to the superintendent of insurance.'

Section 6281, Revised Statutes of Missouri 1919, of Missouri Statutes provides:

'Each such company shall also report (annually) the total amount of its earnings on unearned premiums, and such other matters as the superintendent of insurance may require.'

[fol. 607] Section 6283, amended in 1923 and appearing as Sec. 6283 -- 1927 Annotated Supplement of Missouri Statutes, provides for the powers of the Superintendent of the Insurance Department of the State of Missouri and, among other things, provides that the said Superintendent is:

'empowered to investigate the necessity for a reduction of rates, If, upon such investigation, it appears that the rates charged in this State by the stock fire insurance companies for the five years next preceding such investigation are producing a profit in excess of what is reasonable, he shall order such reduction of rates as will, in his opinion, produce a fair and reasonable profit only. Any such reduction ordered by the Superintendent of Insurance shall be applied by the companies, subject to his approval. If the companies do

not, within thirty days, submit a classification, or classifications, which meet the approval of the Superintendent of Insurance, he shall apply such reduction in such manner as appears to him to be just and equitable. In determining the question of rates and profits, in accordance with this article, the Superintendent of Insurance shall give proper and reasonable consideration to the conflagration liability both within and without the state. He shall also take into consideration the acquisition cost and administration expense of such companies, and all earnings of such companies, including investment profits. He shall also consider whether or not the underwriting activities of such companies are conducted on a reasonably economical basis, and whether or not their investments have been and are being made in a safe and reasonable manner, it being the intention of this section to provide that policyholders shall not be charged rates which will cover losses occasioned by extravagant methods or unsafe and speculative investment of funds.'

Section 6287, Revised Statutes Missouri 1919, is the section providing for penalties as respects any violations of provisions in contemplation respectively of Sections 6270 and 6286, inclusive, which, together with said Section 6287, are all contained in Article VIII in said Statutes, [fol. 608] and it is by said Section 6287 provided:

'The superintendent of insurance, if he shall find that any insurance company or any officer, agent or representative thereof, has violated any provision of this article, may in his discretion revoke the license of such offending company, officer or agent, but the revocation of the said license shall in no manner affect the liability of such company, officer agent or representative to the infliction of any other penalty provided by the laws of this state. Any fire insurance company or any director or officer thereof, or any agent or person acting for or employed by such company who, alone or with any other corporation, company or person, shall wilfully do or cause to be done or shall wilfully suffer or permit to be done any act, matter or thing in this article prohibited or declared to be unlawful, or who shall wilfully suffer or permit any act, matter or thing in this article required to be done, or shall cause or wilfully suffer or permit any act, matter or thing so di-

rected by this article to be done, not to be done, or shall be guilty of any infraction of this article, shall be deemed guilty of misdemeanor and shall upon conviction thereof be punished by a fine not to exceed five hundred dollars for each offense: Provided, that if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination, such person shall be punished by a fine of not to exceed five hundred dollars or by imprisonment in the county jail for a term not exceeding ninety days or by both such fine and imprisonment.'

Section 6222 of Missouri Revised Statutes 1919 makes provision for a report, annually, by insurance companies to the Superintendent, of their doings and affairs and the method and manner in which they shall state and arrive at the surplus, wherein it is, among other things, provided, that they shall as to fire and tornado risks state and take into account, in disclosing their surplus and the state of their affairs:

[fol. 609] 'Fifth: premium reserved or amount required to safely reinsure all outstanding risks, to be estimated by taking fifty per cent. of the gross premiums on all unexpired fire risks that have less than one year to run, and a pro rata of all gross premiums on risks that have more than one year to run.'

By Section 6311 of Missouri Revised Statutes 1919, it is provided that:

'If any foreign or non-resident insurance company, * * * doing business in this State * * * shall institute any suit or proceeding against any citizen of this State in any federal court, it shall be the duty of the Superintendent of the Insurance Department to forthwith revoke all authority to such company, corporation, association or concern, and its agents, to do business in this state.'

By Section 6333 Revised Statutes of Missouri 1919 it is provided that:

'It shall not be lawful for the directors, trustees or managers of any insurance company to make any dividend, except from the surplus profits arising from their business * * *. Any company violating the provisions aforesaid shall be subject to proceedings for dissolution.'

(3) On and prior to December 30, 1929, it, the plaintiff was an insurance company, commonly known as a fire insurance company, authorized by its charter to effect insurance against the risk of loss by fire (lightning), hail and windstorm, and did maintain a public rating record in the State of Missouri from which the rate of premium applicable to each risk in the State of Missouri to be written by said company might be ascertained in advance of the making of insurance thereon, which rating record was full and complete and in compliance with the [fol. 610] provisions of Section 6270 of Missouri Statutes, which public rating record was by it publicly maintained in the office of Missouri Inspection Bureau an actuarial bureau, located in St. Louis in said State.

And it, the plaintiff, was duly licensed and authorized to do such business in the State of Missouri, and in all things complied with the provisions of the statutes of Missouri for entry upon and doing the business of fire and windstorm and allied kinds of insurance in said states.

And it, the plaintiff, says that prior to August, 1929, there existed and had been created and existing a level of rates of premium charge upon fire insurance and a level of rates of premium charge upon windstorm insurance, established and existing uniformly through said state for a long time, namely, more than six (6) years prior to that date, which was conformed to and adhered to by plaintiff and in general by stock fire insurance companies doing such classes of business in the State of Missouri. Such level of rates was applied upon mercantile, manufacturing and special hazard risks by relative measurement and determination of hazard inhering in various risks, applied upon rules, standards, analysis and fixation of basic rates, and charges and credits applied thereto.

And upon risks not reasonably subject to analysis a common rate base was applied more or less flat in its nature but variant in the ultimate premium charge by application of common factors relating to structure, protec- [fol. 611] tion and other elements of difference in risks designed to make charges vary only because of differences in hazard. Such rates so based were applied with practical uniformity throughout the state and adhere to and employed by plaintiff and generally by stock companies doing such business in the state. The administration and creation of this relativity and level of rates was ad-

ministered for plaintiff largely through medium of Missouri Inspection Bureau, which ascertained and determined relatively equitable rates according to rules of measurement in general known as analytic system for measurement of relative fire hazards and divers schedules by it created, administered and applied, and by inspection and examination of risks and hazards inhering in the various properties in the state. In the creation of an equitable relation of risks, one to the other, such relativity was established to the extent that scientific progress in rating had developed, and was the subject of scientific determination, inspection and application of engineering, and fire-prevention knowledge and experience, and the plaintiff and other stock companies doing business in Missouri subscribed to and were members of Missouri Inspection Bureau administering such service.

In August, 1929, the level of rates upon fire insurance and upon tornado insurance was, under protest and (pursuant to direction of the Superintendent of Insurance of Missouri made in 1922, but which was the subject of litigation and not applied until August, 1929) reduced ten [fol. 612] per cent.

Upon the 30th day of December, 1929, plaintiff did change and increase the then reduced level of its rates upon (1) fire (and lightning), and (2) windstorm insurance, and upon each of such classes of insurance, and did make such change and increase of rates upon its public rating record and, on said day, give notice to the Superintendent of Insurance thereof, making such change on its public record in writing, and immediately giving notice thereof to the Superintendent of Insurance, which said notice so given to the Superintendent of the Insurance Department of the State of Missouri, (except for signatures thereto appearing,) is in words and figures as appears in the plaintiff's Exhibit I hereunto attached and made a part hereof by reference as if herein fully set forth. And plaintiff says that the name of it, the plaintiff, was unto said notice appended.

And the plaintiff says that by said change in its public record and upon the giving of said notice the plaintiff did thereby increase its rates upon fire (and lightning) insurance and upon tornado insurance sixteen and two-thirds per cent (16 2/3%) above the level immediately theretofore existing, which is an increase of five (5%)

per cent above the level of rates on such classes existing in 1924, 1925, 1926, 1927 and 1928.

Plaintiff further states that neither it nor other insurance companies doing business in said State of Missouri at any time had, nor do they now make, insurance against [fol. 613] the hazard of lightning by separate policies of insurance but such insurance is uniformly made as an incident to and by the same policy whereby fire insurance is made, and no separate or added charge is made because of carrying the hazards of lightning; and where the plaintiff hereinafter refers to fire insurance, the said term 'fire insurance' is designed and intended to include and embrace 'lightning' as if said term were in each case repeated.

And the plaintiff says that by its said change on its public record in writing, and in its said notice to the Superintendent of the Insurance Department of the State of Missouri (plaintiff's Exhibit I), the changes in the rates upon fire insurance and the changes in rate upon windstorm insurance were, and each of them was, altered and so increased and therein stated and declared to be effective February 1, 1930, (by which notice and filing the plaintiff intended and stated, and accomplished an increase not to be placed in effect immediately upon the said filing, but to be enforced and placed in effect on February 1, 1930); and the approval of the Superintendent of Insurance was requested at such reasonable time before the said effective date specified as would permit the practical application of such rates.

And plaintiff further states that it, the plaintiff, did from month to month, to-wit, in each month after December 30, 1929, receive a request from the Superintendent of Insurance that the effective date be extended [fol. 614] to a future date, and the plaintiff complied with said requests, and before the effective date so specified, did, during the month of January, specify and file a new effective date, namely March 1, 1930; and did, during the month of February, upon like request, specify and file a new effective date, namely, April 1; and did, during the month of March, file and specify a new effective date, namely, May 1; and did, during the month of April, upon like request, file and specify a new effective date namely, June 1; and it, the plaintiff, did specify and make filing of such newly designated effective

dates of its said rate increases because of representations and assertions by the Superintendent of the Insurance Department of Missouri that he had not had opportunity reasonably to acquaint himself with the facts and desired that the matter be extended to permit further investigation into the same; and each of said changes of effective date were made in writing on the public record of the plaintiff in Missouri and notice thereof given to the Superintendent of the Insurance Department of Missouri before the arrival of the effective date theretofore specified; and the plaintiff attached hereto, as plaintiff's Exhibit II, a true copy of the notice transmitted by it in April, 1930, which is made a part hereof by reference as fully as if herein recited, and plaintiff says that the notices previously sent and made were to like effect, except as to specification of respective effective dates in said various [fol. 615] notices contained.

(4) And plaintiff further states that the defendant; The Superintendent of the Insurance Department of the State of Missouri, well knowing that it, the plaintiff, suffered great loss from day to day by failure and neglect on his part to act upon and approve said rate changes and increases, and by failure of said increases to become effective, nevertheless to approve the same, or to give any notice of approval thereof to the plaintiff or in any wise to take any action thereon the Superintendent of Insurance wholly neglected and failed, and said Superintendent made no approval and no disapproval of the said filings as respects either fire insurance or windstorm insurance at any time prior to commencement of this suit and filing of the original bill of complaint herein; but, to the contrary, and insisted and asserted that the plaintiff was bound for the future to continue to write insurance upon said classes of insurance at the rates existing prior to December 30, 1929, and without including in the premium charges of the plaintiff the said respective increases aforesaid. But although the defendant, the Superintendent of Insurance, took no action on the part of him, the said Superintendent and made no ruling or order, approval, disapproval, consent or denial of consent to said newly created rates, nevertheless he asserted a lack of power in plaintiff to collect, enforce or receive such increases without approval of the Superintendent first had.

[fol. 616] And the plaintiff says that on the 28th day of May, 1930 and immediately after the filing of the original bill of complaint herein and on the same day, the Superintendent of the Insurance Department of the State of Missouri did make his certain order, direction and ruling, which was transmitted to and received by Missouri Inspection Bureau, agency of the plaintiff and other stock fire insurance companies doing business in the State of Missouri, and so by said Bureau received on May 29th, which said order, ruling and findings were and are in words and figures following:

'May 28, 1930

Messrs. Waterworth & Terry, Mgrs.
Missouri Inspection Bureau,
1330 Pierce Bldg.
St. Louis, Missouri

Gentlemen:

On December 30, 1929, as managers for the Missouri Inspection Bureau, you filed an application with the Superintendent of Insurance of Missouri on behalf of all companies represented by your Bureau, whose names were appended to your application for an increase on fire, lightning, windstorm and hail insurance rates of 16 2/3% above the rates now existing as created by filing made under protest dated August 8, 1929 and filed with the Superintendent of Insurance of Missouri on August 9, 1929.

I find that the income of such companies from business in Missouri during the year 1924, 1925, 1926, 1927 and 1928, amounted to $115,428,623.00, and that the losses [fol. 617] paid and expenses of said companies chargeable to said business, amounted to $110,672,997, and that said companies had a net profit during said period on the Missouri business of $4,755,626.00, and that the rates heretofore charged and now existing for fire, lightning, windstorm and hail insurance in the State of Missouri are adequate and that the application of said companies for an increase of 16 2/3% in fire, lightning, windstorm and hail rates should be and is hereby denied.

Done at my office in the City of Jefferson, this 28th day of May, 1930.

Jos. B. Thompson
Superintendent of Insurance.'

And the plaintiff says that the said Superintendent of the Insurance Department of the State of Missouri, in the making of his said findings and order aforesaid did purport to rule and asserted and now asserts and claims that by his said ruling and order aforesaid he has disposed of and ruled upon said notice of increase and does not intend or design to make any further or other ruling or order as respects it, the plaintiff, or the said application of the plaintiff, but asserts and contends that he has by his said order and direction ruled upon and passed upon the increase so by plaintiff made on December 30, 1929, effective June 1, 1930, and asserts and claims that he has thereby acted upon the same completely and without requirement of any further action on his part, and [fol. 618] although more than ten months has now elapsed since said ruling or order he has made no further order or ruling.

(5) And plaintiff further alleges that together with its notification of increase, namely, the plaintiff's Exhibit I, the plaintiff did deliver and file with the Superintendent of the Insurance Department of the State of Missouri, a statement of the experience of it, the plaintiff, year by year for the five (5) calendar years prior to that time for the State of Missouri, namely, the experience of the plaintiff of income and outgo upon its business of insurance upon the hazard of fire and upon the hazard of windstorm, as well as other classes, for the five (5) calendar years, 1924 to 1928, both inclusive.

And it, the plaintiff, says that a statement and tabulation of income and outgo of other fire insurance companies doing business in the State of Missouri was at the same time delivered to the Superintendent of Insurance, so that he had before him and there has been in his possession since December 30, 1930, the experience of each and all stock fire insurance companies doing business in Missouri, showing their income and outgo on their business of insurance, not only in the said classes as respects which an increase was so applied for, but there was delivered to him also the experience of the plaintiff and each and all other stock fire insurance companies doing business in the state for said period upon all other classes [fol. 619] of insurance by them written, as well as upon the classes upon which an increase was so made and demanded, as aforesaid. And in addition the said super-

intendent has detail reports of experience by years from plaintiff and all other fire insurance companies doing business in the state which he has exacted annually on blanks prescribed by said defendant.

And plaintiff further alleges that fire (lightning) insurance is a distinct class of insurance, the hazards whereof are variant from and determination of equitable relative charges for undertaking which and affixing of premium charge for assumption of risks involves considerations not inhering in other classes of hazards insured against by plaintiff and other fire insurers, in that structure, protection, exposure and nature of contents, as to inflammability and damageability, are of prime importance in fire insurance, and the subject of scientific study, measurement and determination of hazards, which make it a class apart; the affixing of rates of premiums for assumption of which involve elements not pertaining to other classes. And windstorm insurance is a class apart, wherein the wind resisting type of structures, the geographical location respecting likelihood of storms, the nature of the terrain as influential respecting likely damage, the stability and permanence of attachment to the earth and like considerations involve problems not inhering in other hazards.

But it, plaintiff, says that tornado and windstorm [fol. 620] insurance is a comparatively new field of insurance and not as generally distributed as fire insurance and involves elements of chance not readily absorbed in averages, wherein it differs from fire insurance.

And the State of Missouri, and each of the other states of the Union, recognize the propriety of such classification and require and exact statements annually, separately stating experience upon fire risks, and separately upon tornado or windstorm risks. And those engaged in and familiar with the business universally recognize and treat said classes as distinct and separate and entitled to self-sustaining and profit-making premium charges for insuring risks against such respective hazards and also the business of insurance transacted in a state is upon the whole thereof entitled to make a reasonable profit.

(6) And the plaintiff further says that, together with Plaintiff's Exhibit I, the plaintiff delivered to the Superintendent of the Insurance Department of Missouri tabu-

lation of the Missouri experience of the plaintiff for the said period, 1924 to 1928 inclusive, compiled from its records, tabulating net written premiums, paid losses and expenses, and also earned premiums and incurred losses and expenses, year by year, by classes, for the said five-year period.

And it, the plaintiff, says that by 'net written premiums' as the said term is employed in this bill, is meant the Missouri net premiums stipulated in gross in the policies written during said term, deducting therefrom premiums [fol. 621] returned to policyholders or subject to return and taking into account premiums received and paid respecting reinsurance in companies authorized to do business in the state. And by 'paid losses and expenses,' as the said terms are here employed, the plaintiff means losses and expenses expended and paid during said period upon Missouri business, for the payment whereof the plaintiff was obligated and arising upon and attributable to risks upon which net premiums were derived.

And the plaintiff did also make statement to the Superintendent and deliver figures to him, together with Plaintiff's Exhibit I, a true tabulation of its earned premiums and incurred losses and expenses during the said terms of years, and statement and calculation of plaintiff's profit or loss upon its Missouri business during said term.

And by 'earned premiums,' of a period under calculation, the plaintiff means the Missouri premiums paying for indemnity furnished during said period, excluding therefrom any collections during said period paying for insurance subsequent to said term upon policies extending to later dates, and including as income or earned premiums the pro rata of premiums upon policies written prior to such term under computation, paying for insurance during the term mentioned. And by 'incurred losses and expenses,' as said terms are employed, the plaintiff means the Missouri losses for which the plaintiff became liable during said term and obligation for [fol. 622] which arose or became fixed; and, those expenses for which plaintiff became liable upon such business, and upon which obligation matured during said term.

And the plaintiff says that it, the plaintiff, had net written premiums and it paid losses and expenses upon the respective classes of fire insurance, wind-storm insurance, and upon all classes, inclusive of the foregoing classes, during the period 1924 to 1928, as the same were derived and expended respectively, as follows:

TABLE I.

STATEMENT UPON NET WRITTEN AND PAID BASIS, 1924 to 1928 INCL.

	Fire	Windstorm	Total All Classes
Written Premiums	$1,631,875	$303,256	$2,179,042
Paid Losses and Expenses	$1,585,112	$364,901	$2,172,523
Overplus or deficiency of written premium to meet paid losses and expenses (overplus +; deficiency –.)	$ +46,763	$–61,645	$ +6,519

And it, the plaintiff, says that its experience in the State of Missouri and its said net premiums and its said paid losses and expenses adjusted to the level of rates as the same stood reduced immediately prior to its rate filing of December 30, 1930, were as follows:

[fol. 623]

TABLE II.

STATEMENT UPON NET WRITTEN AND PAID BASIS, 1924 to 1928, INCL., ADJUSTED (TO REDUCED BASIS IN FORCE FROM AUGUST 1929 FORWARD).

	Fire	Windstorm	Total All Classes
Written Premium	$1,468,688	$272,930	$1,984,155
Paid Losses and Expenses	$1,533,680	$355,314	$2,108,643
Overplus or deficiency of written premiums to meet paid losses and expenses (Overplus +;) (Deficiency –.)	$ –64,992	$–82,384	$ –124,493

And plaintiff says that the experience of plaintiff upon its business in the State of Missouri during the said period, 1924 to 1928, inclusive, upon the basis which it, the plaintiff, says is a sound and proper basis of computation, namely, upon the basis of earned premiums as income and incurred losses and expenses as outgo, upon the rate level then in force was as follows:

TABLE III.

EXPERIENCE UPON EARNED AND INCURRED BASIS, 1924 to 1928, INCL.

	Fire	Windstorm	Total
Earned Premiums	$1,440,143	$ 224,196	$1,914,055
Incurred Losses and Expenses	$1,588,146	$ 374,288	$2,183,117
Underwriting Loss	$ -148,003	$-150,092	$ -269,062

And it, the plaintiff, says that the foregoing tabulation adjusted to the level of rates which were in force from August 1929 forward to the rate filing of December 30, 1930, and which was the basis in force immediately [fol. 624] before the rate filing here the subject of suit, was as follows:

TABLE IV.

EXPERIENCE UPON EARNED AND INCURRED BASIS, 1924 to 1928, INCL., ADJUSTED (TO THE BASIS OF RATE LEVEL IN FORCE FROM AUGUST, 1929, FORWARD).

	Fire	Windstorm	Total
Earned Premiums	$1,312,150	$ 204,399	$1,764,891
Incurred Losses and Expenses	$1,536,714	$ 364,701	$2,119,242
Underwriting Loss	$ -224,564	$-160,302	$ -354,351

And the plaintiff further states that since the making of said filing, another calendar year has elapsed and been reported to the Superintendent of Insurance in the annual statement of plaintiff, and that although the plaintiff asserts that the five-year experience existing when the plaintiff made its said filing forms a true and just period for the test and admeasurement of the experience of the plaintiff, whereby to measure probability for the future yet for the information of the court plaintiff submits the experience by it had in the State of Missouri for the year 1929, a tabulation of which additional experience is hereunto attached as Plaintiff's Exhibit III and made a part hereof by reference.

Plaintiff further states that the aggregate experience of stock fire insurance Companies doing business in Missouri for the five-year period, 1924 to 1928, both inclusive, (submitted to the Superintendent with Plaintiff's Exhibit I) was as follows: adjusted to basis of rates exist- [fol. 625] ing at date of filing Plaintiff's Exhibit I.

WRITTEN AND PAID BASIS

	Fire	Windstorm	Hail and all other	Total
Written premiums	$82,198,713	$12,090,700	$22,539,475	$116,828,888
Paid losss and paid expenses	88,982,899	22,472,313	21,971,401	133,426,613
Deficiency of premiums to meet losses and expenses	6,784,186	10,381,613	(+ 568,074)	16,597,725

Said companies in the aggregate suffered a loss upon the conduct of their business above income in the State of Missouri, namely, incurred losses and expenses in excess of premiums earned by them upon their business of fire insurance, and upon windstorm insurance, and upon their total business in Missouri. In other words, their outgo exceeded income upon each such class and upon all classes; (which experience was filed with the Superintendent, with Plaintiff's Exhibit I) as follows: Same basis as above.

EARNED AND INCURRED BASIS

	Fire	Windstorm	Hail and all other	Total
Earned premiums	$79,452,252	$ 9,827,135	$22,184,950	$111,464,337
Incurred losses and incurred expenses	89,182,742	22,573,924	23,003,053	134,759,718
Underwriting loss	9,730,489	12,746,789	818,103	23,295,381

It, the plaintiff, says that the income of stock fire insurance companies doing business in Missouri during the period 1924 to 1928, both inclusive, was the income they [fol. 626] had from their premiums, set forth in the tabulations foregoing and that they did not have an income from other sources in anywsie arising out of other business conducted in Missouri, and that they did not have the income by the defendant, the Superintendent of Insurance recited in his rate order, and that their income was a greatly lesser sum than by the Superintendent so asserted and so recited and was the sum so by plaintiff above set forth.

And the plaintiff says that the said paid losses and expenses of the stock fire insurance companies chargeable to their business in Missouri was a much larger sum than by the Superintendent in his communication of May 28 recited, that the figures so by the Superintendent so recited are inadequate, untrue and incorrect.

And plaintiff says that the said stock fire insurance companies did not have any net profit in Missouri in the sum of Four Million, seven hundred fifty-five thousand, six hundred twenty-six ($4,755,626.00) Dollars, or in any other sum during the said period, but that, to the contrary, transacted their business of insurance in said state at a loss and with no profit whatever.

And that the said Superintendent had no evidence whatever in anywise before him of the supposed experience of stock fire insurance companies in the State of Missouri as by him recited and gave no notice of hearing to the plaintiff or any other stock fire insurance com- [fol. 627] panies doing business in said state and had no hearing; that each and every of his said findings is not in accordance with fact and were arrived at by him without any evidence or hearing, and whatever basis the Superintendent employed in arriving at the same was, upon an arbitrary, unreasonable, confiscatory method of calculation.

And it, the plaintiff, says that the experience figures upon the aggregate of the above companies set forth, are those in the tabulations above set forth by the plaintiff in this paragraph of the bill, and are the tabulations filed with the said Superintendent and from the aggregate of all individual experience figures filed with him; that he had no other evidence and no other experience figures presented, filed or transmitted to him upon any hearing upon the said application of the plaintiff or subsequent thereto at any time before the making of his said order.

And it, the plaintiff, further says that it, the plaintiff, is under common management respecting its business of insurance in the United States, and in the State of Missouri, and has been so under common management with certain other fire insurance companies during the period 1924 to 1928 inclusive; and it, the plaintiff, and said other companies, styled 'Associate Companies' are each and all of them were and are licensed and were doing business in the State of Missouri during the period, 1924 to 1928 inclusive, and transacted the business of fire insurance and [fol. 628] windstorm insurance in said state.

And plaintiff says that the underwriting policies of plaintiff and its said associates and the conduct of their insurance business has been managed by common employes, managers and supervisors, with a practical identity

of officers and underwriters controlling them and their insurance affairs, and that although they are distinct legal corporate entities, their business, nevertheless, is interchanged by reinsurance, said companies reinsuring the risks, one of the other.

And plaintiff further says that it is common in the business of insurance for companies to so operate in groups, and that it is customary for the larger of such companies, with a wider spread of business and with a great diversification of risks, to absorb the business of more hazardous kinds and to take from the smaller companies in such groups any large amounts at risk arising at any one place, so as to eliminate, so far as possible, the chance of a destructive loss at a single location as respects a smaller company not so well equipped to distribute and bear the shock of unexpected losses.

And it, the plaintiff, says that the company in the group of which the plaintiff is one so under common management, known as the parent company, so absorbing the more concentrated risks, is American Insurance Company. And it, the plaintiff, says that it and its said associate companies are each and all well established companies and well and properly managed, and each have es- [fol. 629] tablished business and agency plants in Missouri, and that, because of such common management and such interchange of business and the policies so as aforesaid adopted by the plaintiff and its associates, the experience of it, the plaintiff, and its associate companies ought by the Court to be considered and taken into account in weighing the equities to which it, the plaintiff, is entitled; wherefore, the plaintiff here sets forth the experience of its associate companies.

And plaintiff says that Columbia Fire Insurance Company is a fire insurance company which transacted business in Missouri during the period 1924 to 1928, inclusive, and is under the same management as it, the plaintiff, and its underwriting conducted by the same executives and managers; and the experience of such associate company of the plaintiff, the plaintiff says ought soundly to be taken in account, in considering the experience of plaintiff for the said period aforesaid. The experience of said associate on bases indicated is as follows:

TABLE I.

STATEMENT UPON NET WRITTEN AND PAID BASIS, 1924 to 1928 INCL.

	Fire	Windstorm	Total All Classes
Written Premiums	$ 55,930	$ 9,713	$ 69,896
Paid Losses and Expenses	$ 51,673	$ 30,367	$ 87,396
Overplus or deficiency of written premiums to meet paid losses and expenses	$ +4,257	$–20,756	$–17,500

(Overplus +; deficiency –)

[fol. 630] And it, the plaintiff, says that in August, 1929, the level of rates on fire and windstorm insurances were under protest and by direction of the Superintendent of Insurance of the State of Missouri reduced ten per cent (10%), and the rate level remains so reduced from that in force during the period above set forth up to the said rate filing of December 30, 1930. And plaintiff says that the experience of such associate of the plaintiff upon the basis of such reduced rate level was as follows:

TABLE II.

STATEMENT UPON NET WRITTEN AND PAID BASIS, 1924 to 1928, INCL., ADJUSTED (TO REDUCED BASIS IN FORCE FROM AUGUST 1929 FORWARD).

	Fire	Windstorm	Total All Classes
Written Premiums	$50,337	$ 8,743	$ 63,292
Paid Losses and Expenses	$50,415	$ 30,249	$ 82,035
Overplus or deficiency of written premiums to meet paid losses and expenses	$ –78	$–21,507	$–18,743

(Overplus +; deficiency –)

And the plaintiff says that a sound and proper basis of computation of profit and loss of such associate of the plaintiff is upon the basis of earned premiums as income, and incurred losses and expenses as outgo, and the experience of plaintiff's said associate upon the rate level in force during the period, 1924 to 1928, inclusive, was as follows:

[fol. 631]

TABLE III.

EXPERIENCE UPON EARNED AND INCURRED BASIS, 1924 to 1928, INCL.

	Fire	Windstorm	Total
Earned Premiums	$ 39,021	$ 5,399	$ 47,923
Incurred Losses and Expenses	$ 52,373	$ 32,230	$ 89,885
Underwriting Loss	$-13,352	$-26,831	$-41,912

And plaintiff says that the foregoing tabulation adjusted to the reduced level of rates in force immediately prior to the rate filing of December 30, 1930, is as follows:

TABLE IV.

EXPERIENCE UPON EARNED AND INCURRED BASIS, 1924 to 1928, INCL., ADJUSTED (TO THE BASIS OF RATE LEVEL IN FORCE FROM AUGUST, 1929, FORWARD).

	Fire	Windstorm	Total
Earned Premiums	$ 35,119	$ 4,859	$ 43,491
Incurred Losses and Expenses	$ 51,115	$ 30,012	$ 88,400
Underwriting Loss	$-15,096	$-25,153	$-44,909

(7) And it, the plaintiff, says that if it, the plaintiff, continue the writing of its business of fire insurance at preexisting rates free of increase of December 30, 1929, effective June 1, 1930, and continue the writing of windstorm insurance at preexisting rates, namely, at rates obtaining prior to December 30, 1929, the plaintiff will, in so doing, conduct its business in each such classes and upon all its business of insurance, in Missouri, at an actual loss and without any compensation whatever to the plaintiff for the doing of said business, but, to the con- [fol. 632] trary, the outgo of the plaintiff upon the conduct of such business in said classes and upon the whole will exceed its income.

And it, the plaintiff, says that its outgo on said classes respectively has been in excess of its income for more than six years prior to the increase so placed in effect by it and whereof it gave notice to the defendant, the Superintendent of the Insurance Department of the state of Missouri.

And it, the plaintiff, says that it has, during the period of five years, 1924 to 1928, conducted its business of fire insurance in Missouri at a loss upon the conduct of said business as aforesaid, and upon its business of windstorm insurance during said period of five years it has conducted its said business in Missouri at a loss as aforesaid and

conducted its insurance business in said state at a loss, and it, the plaintiff, will suffer like losses in the future if it continue writing business at the former level of rates namely will have outgo in excess of income and will suffer and does now suffer a daily loss in the conduct of its business in excess of $50 per day, which loss it will continue to suffer from day to day if it be not permitted to increase the level of its rates upon respective classes of fire insurance and windstorm insurance according to its said filings.

And the plaintiff says that the income from the conduct of its said business without the said increases is so low as to be wholly inadequate to meet losses and [fol. 633] reasonable expenses and to give to plaintiff any reasonable compensation or any compensation whatsoever, and will if continued to be done at preexisting rate level cause the plaintiff to do business at less than a reasonable profit, namely, with no profit whatsoever.

And the plaintiff says that if compelled to so do business at preexisting rates it will be forced either to do business at a loss and without any reasonable profit and without any profit whatsoever, or alternatively to withdraw from doing business in the state of Missouri.

(8) And it, the plaintiff, says that it has for many years past had an established business of insurance in the State of Missouri and in said business conducted the business of fire insurance and tornado and windstorm insurance, together with other classes. In its established business it has at great expense created agency connections and contracts with agencies existing in Missouri and had an established business and goodwill of agents and the insuring public, which was and is of great value and was as to each of said classes of business of the value of more than Five Thousand Dollars ($5,000.00). Plaintiff says that such business would be destroyed and rendered of no value if the plaintiff were required to do business at inadequate, confiscatory and unreasonably low rates and says that the rates so existing before the putting in force of the increase of December 30, 1929, were so inadequate, confiscatory and not reasonably com- [fol. 634] pensatory.

Plaintiff further says that it has an established business not only in Missouri, but in many other States of the United States.

Plaintiff further says that the business in which it is engaged in the said respective classes is a busines accompanied by great hazard and greatly affected by change in values, prices of commodities and of materials and structures.

Plaintiff further states that a reasonable period for computation of experience for the purpose of ascertaining the probabilities of the future is an elapsed term of five (5) calendar years elapsing prior to the time of any rate change and, as all the records of plaintiff and other insurance companies are kept by calendar years by direction of various State Departments, that the five (5) year term so proper for consideration as an experience period is the five (5) calendar years preceding the rate change, namely, the period 1924 to 1928, both inclusive. Plaintiff further says that such term of five (5) years is that also prescribed by Missouri Statutes.

Plaintiff further says that in the business of fire and windstorm insurance, plaintiff and others engaged in such business do not employ and use their capital by investment in the business in the sense that the same is done by utilities and persons engaged in merchandising and mercantile, railroad and utility enterprises, but the capital is retained and kept in invested form as a guarantee [fol. 635] fund and required by law to be kept distinct from and not employed directly in the business.

Plaintiff further says that a reasonable profit in said business of fire and windstorm insurance within the boundaries of a State is reasonably to be computed as against the premium income in said State. A reasonable compensation upon fire insurance above losses and expenses incurred therein and after making provision for liabilities on account of unexpired policies, is ten per cent (10%) upon earned premiums for conflagration hazard and for profit. And as respects windstorm and tornado insurance, a reasonable profit or margin of earned premiums, above incurred losses and expenses constituting outgo, is twenty per cent (20%) for profit and the hazard of catastrophe.

Plaintiff further says that the insurance upon hazards of tornado and windstorm is a comparatively new class of insurance, is not commonly or universally taken to value by persons taking such insurance and such insurance is much less commonly taken by property owners

than is the case respecting fire insurance. The insurance against the hazard of windstorm and tornado, for the foregoing and other reasons incident to the nature thereof, involves a great element of chance. The law of averages, making fire insurance comparatively regular in its experience, does not likewise step into windstorm and tornado experience which is highly erratic and a much larger leeway in rate charges is necessary to induce under- [fol. 636] writers to assume the chances of such business.

Plaintiff further states that the increases so put in force by filing of December 30, 1929, if collected and retained by the plaintiff, would produce no more than a reasonable profit, and in no way would be productive of an unreasonable, excessive or exorbitant return, but to the contrary thereof a denial or withholding of such increase would be productive of unreasonably low and confiscatory rates, if imposed upon the plaintiff.

And yet plaintiff says although its rates as so increased by it the plaintiff are reasonable and in nowise excessive yet the defendants threaten if plaintiff collect same they will visit upon plaintiff penalties and proceedings for violation of law claimed to arise from said acts, and defendants threaten to, and if not restrained will proceed to cancellation of the license of plaintiff to do business and to cancellation of licenses of its agents and will do so without notice or hearing and will proceed to a multiplicity of proceedings for penalties, treating each policy so written as a separate offense.

Plaintiff further says that after the filing of the original bill of complaint herein and later on the same day or the evening of said day, the Superintendent of the Insurance Department of the State of Missouri did make a certain order or ruling more particularly in the fourth paragraph of this amended and supplemental bill set forth; and in the making of his said findings and order, the said Superintendent did purport to and now asserts and [fol. 637] claims that he did by said findings and ruling dispose of and rule upon the said notice of increase, and he, the said Superintendent, has not undertaken to retain or keep further jurisdiction of said matter or further to rule upon the said notification of increase by the plaintiff, but asserts and contends on the part of him, the said Superintendent, that he has by his said order made an order of disapproval of the said filing of increase.

And plaintiff says that the said defendant, the Superintendent, has by his said ruling, entirely failed to rule upon and determine the propriety of the increase on the part of it, the said plaintiff, and has misconstrued and illegally applied the Statutes of the State of Missouri as against the plaintiff, and in particular, Section 6274 of the Revised Statutes of Missouri and Section 6283 of the Revised Statutes of Missouri. The latter section he has undertaken to adopt as a rule for the guidance of his action, but has not applied the same to the plaintiff legally or constitutionally, but by his said action has infringed upon the legal and constitutional rights of it, the plaintiff, and has failed to make any determination respecting such increase in fact in that he has purported to act upon the aggregate experience of all companies doing business in the State of Missouri as he has by his answer to the original bill herein confessed and admitted and not in anywise given any consideration to or ruling upon the rights of the plaintiff to relief.

[fol. 638] Wherefore, the plaintiff says that said Statutes by their terms as written and by the construction placed thereon by the said Superintendent and by his application thereof to the plaintiff and by his said threats of action against plaintiff he does proceed in violation of the rights of the plaintiff under the Constitution of the United States and particularly in that he thereby denies to the plaintiff the equal protection of the laws, and deprives it of its property without due process of law, and said Statutes as written and as so construed and applied likewise proceed in violation of the constitutional rights of the plaintiff in the same particulars as plaintiff more particularly sets forth in the following paragraph of this, its amended and supplemental bill.

(9) And it, the plaintiff, says that said Section 6274 of the Revised Statutes of the State of Missouri and Section 6283 of the Revised Statutes of Missouri and the said order of the said Superintendent of Insurance, of date May 28, 1930, and the said sections of the Statute aforesaid as construed and applied to the plaintiff by the said order, and the failure and refusal of the said Superintendent to act upon or give consideration to the experience of it, the plaintiff, and the separate rights of it, the plaintiff to relief and each of said Statutes, orders and refusals of action aforesaid, are operative to deny to it, the plain-

tiff, the equal protection of the laws and to deprive it of its property without due process of law, in violation of [fol. 639] Section 1, of the Fourteenth Amendment to the Constitution of the United States. And the said rate order and the said failure and refusal of the Superintendent to act upon the notice of it, the plaintiff, seasonably, and his threats of action to proceed for penalties and for cancellation of licenses and each such action and threatened action is in violation of the said Statutes and the lawful and sound construction and application thereof, and more particularly the plaintiff says:

(a) Section 6274 of the Revised Statutes of Missouri, 1919, is the only provision of the Statutes of Missouri in anywise limiting or purporting to limit the right of the plaintiff to institute increases of rate at the will of plaintiff. Said section provides for notice to the Superintendent of any increase effected by plaintiff, but provides no standard, rule or guide whereby the Superintendent shall be governed in his consideration of such notice of increase or the conditions, terms or considerations upon which his approval shall be granted or withheld. To the contrary, the same permits his approval or disapproval to rest in his untrammeled and arbitrary discretion not governed by any rule or guide of Statute. Wherefore the plaintiff says that said Section is void and of no effect and repugnant to the constitutional warranties inuring to the benefit of it, the plaintiff, and is in violation of Section 30 of Article II of the Constitution of the State of Missouri, and of Article III of said Constitution of Missouri, and of Section [fol. 640] 1 of Article IV of the Constitution of Missouri, and the same is operative to deprive the plaintiff of its property without due process of law, in violation of Section 1, of the Fourteenth Amendment to the Constitution of the United States.

(aa) And the plaintiff says that Section 6274, of the Revised Statutes of Missouri, (pursuant to which the Superintendent asserts and claims the power by him exercised to make his said order of May 28, 1930, and the right to proceed no further therein) was and is construed by him, the said defendant, Superintendent, to permit him to regard the said notice of increase to him as an application for an increase which he, the said defendant, was and is empowered by the said Statute, as by him construed,

to grant or withhold as to him might seem proper upon his mere whim or caprice and without any guide or standard whereby his actions should be regulated: And acting upon such construction of said Statute so by him made, he, the said defendant, Joseph B. Thompson, Superintendent, as aforesaid; by the making of his said order and failing and refusing further to proceed and treating his said action as warrantable by law, did thereby proceed in violation of the constitutional rights of it, the plaintiff, and the plaintiff says that said Section 6274, as so construed and so applied to it, the plaintiff, denies to it, the plaintiff, the equal protection of the laws and deprives it, the plaintiff, of its property without due process of law, in violation of Section 1, of the Fourteenth Amendment to the Constitution of the United States

[fol. 641] (b) And the plaintiff says that the only guide or rule in the Statutes of Missouri in anywise applying to the regulation of rates of fire insurance companies in anywise defining the powers of the Superintendent in exercise of rate regulation, is by the provision of Section 6283 of said Statutes providing a rule or guide to be applied in certain cases involving reductions of rates in said Section mentioned and described. And the plaintiff says that he, the said Superintendent, has undertaken to apply and adopt certain of the guides and rules by Section 6283 prescribed, as applicable to increases of rate and as incorporated and forming a rule or guidance for him when acting under said Section 6274 aforesaid.

And plaintiff further states that he, the said defendant, Joseph B. Thompson, has undertaken by his said order of May 28, 1930, to proceed under Section 6274 by treating Section 6283 as incident and a part thereof.

And it, the plaintiff, says that said Section 6283, as applied to it, the plaintiff, is unreasonable and sets up unreasonable, confiscatory and unconstitutional standards and guides which were unconstitutionally and in a confiscatory manner applied by him, the Superintendent, as against it, the plaintiff, and more particularly it, the plaintiff, says that Section 6283 is unconstitutional, unreasonable, arbitrary and confiscatory as the same is written and as the same has, by the Superintendent, been applied [fol. 642] to it, the plaintiff, and as by him so construed,

and if violative of the constitutional rights of it, the plaintiff, in that in derogation of Section 1, of the Fourteenth Amendment to the Constitution of the United States, it does deny to plaintiff the equal protection of the laws and deprives it of its property without due process of law, and so does in the following particulars:

b1. It is by said Section 6283 provided that the Superintendent 'shall also take into consideration the acquisition cost and administration expense of said companies and of all earnings of said companies, including investment profits.'

And plaintiff says that except for the inconsequential item of agents' expense, the acquisition cost of the business of the plaintiff and other stock companies engaged in such business consists in the greater part of commissions or remuneration paid to agents transacting and securing business for such insurance companies. Plaintiff further says that the rates of commission by plaintiff paid are those commonly paid by it and its competitors in business and are reasonable; that said commissions vary dependent upon the character of business or property involved and are commonly fixed by schedule or contract, and are rates of which by competitive conditions and by reasonable demands of said agents as a result of negotiations with agents as to their compensation, is upon a reasonable, compensatory basis to them for the services rendered.

[fol. 643] Plaintiff further states that agencies are virtually all multiple agencies in which not only the plaintiff but its competitors are represented, and that it would be wholly impractical and impossible for it, the plaintiff, to reduce, lower or change such commission scale, nor is it in anywise desirable so to do or required by standards of reasonable economy in the business.

Plaintiff further says that the administration expense of it, the plaintiff, is and has been for many years past upon a reasonably sound, moderate and economical basis, and is reasonable compensation for administration of its affairs having the approval of the directors and officers of the companies who are persons skilled and experienced in the business. And plaintiff says that although it has so been frugal, economical and reasonable in its said expenditures, yet, by the terms of the said Statute as con-

strued and applied by him, the said Joseph B. Thompson, as Superintendent, he has eliminated and stricken out expense items of it, the plaintiff, and his competitors whose experience he considered in the aggregate, many items of such reasonable commission and administration expense of it, the plaintiff, and his competitors, and has construed said Statute as warranting and entitling him so to do.

Wherefore the plaintiff says its constitutional rights under the provisions of the Constitution above mentioned have been violated and are violated by the provisions of said law and the construction and application thereof to it, the plaintiff.

[fol. 644] b2. And said Section 6274 (and said Section 6283 furnishing a supposed guide or rule for its application and construction and application of the same to it, the plaintiff, by the defendant, the Superintendent), involve, as the same were applied to it, the plaintiff, aforesaid, the consideration of supposed earnings, inclusive of investment profits not only of it, the plaintiff, but of all other stock fire insurance companies doing business in the State of Missouri and upon such standards and treating investment profits of competitors of plaintiff as an element of income in determining the profit or loss of plaintiff, said Superintendent did make his order of May 28, 1930. And plaintiff says that it has no investments in the State of Missouri, nor did it have during the said test period aforesaid, and the conduct of investment of its surplus funds was conducted and had entirely outside of the limits of the State of Missouri. And plaintiff says that the profit arising from investment of said funds was derived by determination to invest a portion of the assets of the plaintiff and was conducted in the discretion of the officers and managers of the plaintiff beyond the boundaries of the State of Missouri; and he, the Superintendent, in applying and construing the said Section 6283 as a guide to said Section 6274, did take into account as supposed income, in arriving at his conclusions, profits from investment of funds beyond the boundaries of the State of Missouri by the plaintiff and its competitors who did business in the State of Missouri during the five [fol. 645] (5) year period 1924 to 1928 inclusive, and he did take into account profits derived from such invest-

ment as income, but not losses upon investments suffered by plaintiff and other stock fire insurance companies; and plaintiff says that from a consideration of the aggregate experience of all stock companies doing business in Missouri inclusive of plaintiff, and taking into account income derived by them in the aggregate inclusive of investment profits as supposed profits, and eliminating any losses from investments by them and eliminating amounts arbitrarily regarded by him as undue managerial or acquisition costs, he did arrive at and make his said order of May 28, 1930. And plaintiff says that said Joseph B. Thompson, Superintendent, did unconstitutionally thus penalize plaintiff and prescribe inadequate and confiscatory rates because of supposed investment profits acquired by its competitors and because of supposed profits made by it, the plaintiff, upon investments beyond the boundaries of the State of Missouri, and by eliminating from outgo reasonable items of expense of it, the plaintiff, and taking into account as income the profits or experience of competitors of it, the plaintiff, over whom it has no control, and measuring its rights by supposed misconduct of which they may be guilty. And plaintiff says that certain of the competitors of it, the plaintiff, have had large investment profits during the said period and that the taking of the same into account is operative to produce an [fol. 646] experience entirely variant from and showing a much greater margin of supposed profit or diminished loss than if consideration were given to the experience of it, the plaintiff. And it, the plaintiff, says that the said standards of said Section 6283, and therefore, the said Section 6283 by incorporation of said Section into Section 6274, and therefore said Section 6274, and the adoption, application and construction of said Sections whereby the same were so applied and as same are proposed to be applied as against the plaintiff in the said rate order aforesaid, and proposed imposition of penalties against plaintiff, are operative to render each of said Sections of said Statute as the same are written and the said rate order of May 28, 1930, and the said statutory Sections as construed and applied by defendant to it, the plaintiff, void and unconstitutional in that the same violate Section 30 of Article II of the Constitution of the State of Missouri and Article III of the Constitution of the State of Missouri and Section 1, of Article IV of the Constitution of the State of Missouri, and deny to it, the plaintiff, the

equal protection of the laws and deprive it of its property without due process of law in contravention of Section 1, of the Fourteenth Amendment to the Constitution of the United States.

b3. By said Section 6283, the Superintendent is empowered only to act upon aggregate experience of all stock companies and not to take into account the individual experience of a separate insurance company or the con- [fol. 647] fiscatory effect upon its property or denial of an increase. And plaintiff says that the defendant, Joseph B. Thompson, Superintendent, did proceed upon such aggregate experience of all companies, taking into account their supposed experience upon an arbitrary and unreasonable basis without in anywise separately considering the individual experience of it, the plaintiff, and it, the plaintiff, says that said Section 6283 in so confining considerations of the Superintendent to aggregate experience of all companies and inclusive of arbitrary and unreasonable elements of consideration, and therefore Section 6274 embodying and incorporating the guide of Section 6283, and therefore the said order of the Superintendent, of date May 28, 1930, proceed upon arbitrary, unreasonable and confiscatory grounds of action, and the same operate to and did infringe upon the constitutional rights of the plaintiff and deny to it the equal protection of the laws and deprive it of its property without due process of law, in violation of Section 1, of the Fourteenth Amendment to the Constitution of the United States.

b4. And plaintiff says that Section 6283, has been construed by the Supreme Court of the State of Missouri as requiring in a case coming within its terms that consideration of experience for test term of five (5) years, shall be upon the basis of written premiums as income supplemented by interest on unearned premiums, and that outgo shall be computed upon the basis of paid losses and [fol. 648] paid expenses, and requires that there be disregarded as outgo items losses or expenses incurred and for which obligation has become fixed and to exclude from income liability for unearned premium upon policies extending beyond the test period, but written during the said period, and plaintiff says that such erroneous basis above mentioned was employed by the Superintendent in his said rate order and he regards the same as binding

upon him and will employ the same in any further considerations he may have of the matter, and has construed and does construe Section 6283 as so defined as incorporated into and a guide for his actions under notices of increase given under Section 6274. And plaintiff says that it did have incurred losses and expenses in a large amount which were by the said Superintendent ignored in setting up outgo, and did have large liabilities for unearned premium not set up as a liability but the whole of premium writings treated as income of said test period regardless of remaining liability thereon for the future and that its competitors likewise had such large liabilities upon unearned premium and upon incurred losses and expenses, all of which were and will be by the Superintendent in his considerations and under his construction and application of said Statutes, entirely ignored in determining and passing upon the increase and the propriety thereof. And plaintiff says that the said Statutes and each of them and said order of the Superintendent aforesaid and any other and further orders he may or could make under the said [fol. 649] Statutes are and will be predicated upon such basis first aforesaid namely ignoring liabilities in fact existent which the plaintiff says is unreasonable, arbitrary and confiscatory, and has operated and does operate arbitrarily, unreasonably and confiscatorily against the plaintiff. It, the plaintiff, says that it is required by the laws of Missouri to reserve unearned premiums and that the same are soundly and properly to be so reserved and are proper and necessary liability to be set up in ascertaining any profit or loss, and the plaintiff says that its cash expenditures upon the conduct of its business in Missouri during the said test period exceeded its cash income and that it had and has no amount justly to be taken into account as income as interest on unearned premium, and that interest on unearned premium is not soundly to be taken into account as income without invading the constitutional rights of the plaintiff and confiscating its property.

Wherefore the plaintiff says that said Section 6283 and said Section 6274 as the same and each of them are written and said Sections and each of them as construed, and said sections and each of them as applied against the plaintiff in the said rate order, are and each of them is unconstitutional and void and deprive it, the plaintiff,

of its property without due process of law, and deny to it the equal protection of the laws, in violation of Section 1, of the Fourteenth Amendment to the Constitution of the United States.

[fol. 650] (c) And plaintiff says that said Section 6274 of the Missouri Revised Statutes, provides for no notice or any hearing to be granted or permitted to it, the plaintiff, upon consideration of proposed increase, and warrants and authorizes the said Superintendent, by the letter of the said Statute, to proceed to a determination of the propriety or impropriety of the increase without any hearing or notice of hearing. And it, the plaintiff, says that with its said notification of increase it submitted and delivered to the said defendant, Joseph B. Thompson, Superintendent, a tabulation of its experience in the State of Missouri during the five (5) years 1924 to 1928, inclusive, both on a written and paid basis and upon earned and incurred basis, which tabulation so delivered to him discloses and shows that it, the plaintiff, conducts its business of insurance in the said State and each of said classes at a loss and without any profit, and that with said increase applied it would have less than a reasonable profit upon its business in each of said classes, which experience figures so delivered to him were entirely variant from and in nowise the same as those by him in his said order of May 28, 1930, found. It, the plaintiff, says that if the said defendant, Joseph B. Thompson, Superintendent, had any hearing, it was had without any notice to it, the plaintiff, and without any opportunity to be heard and without any hearing. And plaintiff says that he, the said Superintendent, has construed the said Statute as warranting and entitling him to proceed to the determina-
[fol. 651] tion of said matter without notice and without a hearing and he had no hearing and he gave no notice to the plaintiff or anyone for it. And plaintiff says that no power was or could be reposed in the Superintendent under constitutional safeguards to so proceed to a determination and to deny and disapprove the increase or to prevent it, the plaintiff, from placing its increase in effect, or to cancel the license of the plaintiff or its agent, or to invoke penalties of the law upon findings and conclusions so reached by the Superintendent without evidence and without hearing and without notice, and the plaintiff says that there was no evidence before him,

the said Superintendent, in anywise supporting or confirming his said findings or any presentation of any evidence at any hearing at which the plaintiff was present or had opportunity to be present.

Wherefore plaintiff says that said Section 6274 and said Section 6283 (and said Section 6287, being the Section providing for penalties), are and each of them is void and the said order of the said Superintendent is void in that said Statutes and each of them and the said rate order and the said Statutes, as construed and applied by the Superintendent in his said order, are wanting in due process and deprive it, the plaintiff, of its property without due process of law, in violation of Section 1, of the Fourteenth Amendment to the Constitution of the United States.

[fol. 652] (d) It, the plaintiff, says that upon giving notice to the Superintendent of increase, as aforesaid, it delivered to him a tabulation of experience of it, the plaintiff, and tabulation of experience of all companies doing business in the State, and that experience respecting all companies doing business in the State so delivered to him is set forth in this bill of complaint in paragraph 6 foregoing. And it, the plaintiff, says that he, the said Joseph B. Thompson, Superintendent, had before him no evidence of experience of stock fire insurance companies in the State of Missouri except as the same is above set forth, except and unless he did, at some secret hearing at which plaintiff was not present and of which it had no notice, resort to other sources of supposed information, and if he so did the plaintiff has no knowledge what they were. And the plaintiff says that the income of stock fire insurance companies upon their premiums or upon their premiums and interest earnings were not in the sum by him, the Superintendent, found, nor was there any evidence before him, unless it was so secretly before him as aforesaid. There was no evidence whatever supporting his finding that losses and expenses of said companies were in the supposed sum of $110,672,997.00, but they were in fact the much greater sum by the plaintiff above set forth, nor was there before him evidence whatsoever that they had a net profit in the aggregate of $4,755,626.00, or that they had any net profit upon fire insurance or upon windstorm insurance or upon all classes of insurance. Plain-
[fol. 653] tiff says there was no evidence in anywise be-

fore him, the Superintendent, that existing rates were adequate either upon fire insurance or upon windstorm insurance or upon all classes or that there was a profit in any sum on the part of stock fire insurance companies in said State during said period. And it, the plaintiff, says there was no evidence whatsoever heard, presented, considered or in anywise offered before or to or by said defendant in anywise militating against or indicating any error, falsity or incorrectness of the experience figures so to the Superintendent by the plaintiff delivered, or in anywise supporting, sustaining, proving or tending to prove any of the said supposed experience figures or the said supposed profit figures by the Superintendent so, as aforesaid, found in his rate order.

Wherefore the plaintiff says that the said order of the Superintendent is arbitrary, unreasonable and without any basis of evidence and that in his said findings he has either departed from and ignored the directions of said Statutes or said Statutes are unconstitutional in not requiring any hearings or notices or opportunity for plaintiff to know the matters supposedly considered by the said Superintendent in coming to his conclusions; wherefore the plaintiff says that the said order of the said Superintendent is null and of no effect and that the said Section 6274 and the said Section 6283 and the said Section 6281, are null and of no effect in authorizing and [fol. 654] warranting such action on his part, and that the same and each of them and his said findings and his rate order based thereon, are in contravention of Section 1, of the Fourteenth Amendment to the Constitution of the United States, and deprive it, the plaintiff, of its property without due process of law.

(e) And plaintiff says that the said Superintendent in making his said rate order aforesaid, did disallow and eliminate from his consideration certain reasonable outlays in and about the conduct of the business of insurance in said State and so did unto the supposed authority of Section 6283 providing that policyholders 'shall not be charged rates which shall cover losses occasioned by extravagant methods or unsafe and speculative investment of funds.' Plaintiff says that it is not able to state with more particularity what items or elements were by the Superintendent so eliminated from outgo because of application of said directions of said Sections, but states

that he did make elimination of certain items of outgo and did come to conclusion against increase of rates as so proposed upon the theory that same were losses falling within such statutory provision.

And, it, the plaintiff, says that it was in nowise guilty of any extravagant methods nor was it guilty of nor was there any evidence of any speculative investment of funds nor could said issue be soundly for consideration in determining profit or loss upon underwriting, nor was any evidence heard, presented or considered by him, the said [fol. 655] Superintendent, respecting any such supposed extravagant methods or unsafe or speculative investment of funds. And it, the plaintiff, says that its business is managed by officers, directors and trustees who carefully, economically and soundly administer its affairs and that their judgment has been soundly and reasonably exercised. And plaintiff says that it is informed and believes that the said Joseph B. Thompson, Superintendent, arbitrarily and without evidence, made such elimination of items of outgo and recapitulation of supposed experience upon the premise or basis by him adopted that other or different methods of the conduct of the business might or could be employed by plaintiff and its competitors. And plaintiff says that the general conduct of the business of plaintiff and its competitors has been upon a uniform basis operating through agencies for more than fifty (50) years last past, and has not altered or changed since the entry by plaintiff into the conduct of business in the State of Missouri, and that to alter or change its method of conducting or doing its business from the methods now employed would be destructive of its business, unreasonable and result in the entire loss thereof. And plaintiff says it has in nowise engaged in the extravagant or unsafe or speculative investment of funds and that none of its elements of outgo were justly or equitably subject to or entitled to be eliminated from its accounts in the admeasurement of its business. And it, the [fol. 656] [the] plaintiff, says that it, the plaintiff, did its business of insurance in the State of Missouri during said test period without any profit or compensation whatever for the conduct of its business, and would, with said increase, derive less than a reasonable amount from the conduct thereof upon the whole and upon each of the classes mentioned. Yet the plaintiff says that the said defendant, Joseph B. Thompson, Superintendent, al-

though in nowise finding or determining that it, the plaintiff, made any profit upon its business of fire insurance or upon its business of windstorm and tornado insurance or upon all its business in said State or that it would make any profit or any unreasonable profit with increases so applied nevertheless, upon finding without hearing or evidence that competitors of it, the plaintiff, have been guilty of extravagance or have been guilty of unsafe or speculative investment of their funds, did notwithstanding the fact that the increase would produce no undue profit to it, the plaintiff, upon said classes or upon the whole of its business refuse said increase to it, the plaintiff, as he purports to have done by his said rate order.

Wherefore plaintiff says that said Section 6283 as the same is written, and said Section 6274 as the same is written, and the same and each of them as they are construed by him, the defendant, Superintendent, and by him applied against the plaintiff herein and his said rate order of May 28, 1930, are and each of them are null and void and deprive it, the plaintiff, of its property without due [fol. 657] process of law, in violation of Section 1, of the Fourteenth Amendment to the Constitution of the United States.

(f) And plaintiff says that by the provisions of Section 6274, a notice of ten (10) days of a proposed increase is required and it, the plaintiff, says that it is in contemplation of said Statute that he, the said Superintendent, shall seasonably act within such period before the expiration of ten (10) days that the action of plaintiff or others seeking to put an increase in force may be ruled upon so as to have opportunity reasonably apply the same. And plaintiff says that the defendant, Joseph B. Thompson, Superintendent, asserted and claimed that the period so by Statute provided was inadequate to permit him to come to sound conclusions and asserted and claimed that he ought reasonably to have further time to consider such application and pretended to it, the plaintiff, that he was weighing and determining the rights of it, the plaintiff, to said increase, and would reasonably act upon and determine the same if opportunity were given him so to do, and plaintiff further says that relying upon such representations of him, the said Joseph B. Thompson, Superintendent, it did extend the effective date of said increase (which it had in the first instance upon its filing of in-

crease on December 30, 1929, therein provided should become effective February 1, 1930). And it, the plaintiff, upon said representations of him, the said defendant, ex- [fol. 658] tended the effective date of said increase from time to time to June 1, 1930, but seasonably to act upon such notice as so extended or give his approval or disapproval within a reasonable time, or to have any hearing or give notice of hearing or to consider any evidence respecting the same, he the said defendant, wholly failed and refused. And although it, the plaintiff, says he has pretended and that he intended to and would seasonably act upon and determine the rights of it, the plaintiff, individually or severally, from the rights of other stock fire insurance companies, and although he did in his answer to the original bill herein assert and allege that he had, by his rate order, designed only to pass upon an aggregate experience of all companies and would with all reasonable expedition act upon and determine the confiscatory effect upon the plaintiff and separately and severally determine its reasonableness as respects the plaintiff yet the plaintiff says that although more than fourteen (14) months have expired since such filing of increase by the plaintiff, he, the said defendant, has at no time had any hearing or given notice to plaintiff of any hearing or had any presentation of evidence when the plaintiff was present or had opportunity to be present and it, the plaintiff, says that such pretense of said defendant that he proposes to consider the right of it, the plaintiff, to relief and to said increase is a mere pretense of him, the said defendant, and not made in good faith, and that he, the said defendant, does not intend to and will not make any [fol. 659] finding as to the rights of it, the plaintiff.

And it, the plaintiff, says that the failure and refusal of him, the said defendant, Joseph B. Thompson, to take any action through said long space of time upon the notice by the plaintiff, or to make any disapproval as respects it, the plaintiff, separately and severally, or to make any findings as respects the experience of it, the plaintiff; and the assertion of him, the said defendant, that it, the plaintiff, is bound during said entire period and at his will in the future to continue to do business at such confiscatory and inadequate rates, as aforesaid, is inequitable and operates as confiscation of the property of it, the plaintiff. And plaintiff says that this court should

declare that by the failure and refusal of him, the said Joseph B. Thompson, Superintendent, to take action upon the notice of it, the plaintiff, respecting the rights to increase of it, the plaintiff, he, the said defendant, has by his said refusal to act and by his said inaction thereby given approval to the increase of it, the plaintiff. And he, the said defendant, ought to be restrained from interfering with the collection of the reasonable increase so by the plaintiff initiated and put in force, and plaintiff should be permitted to collect its said increased rate without further seeking approval thereof.

Wherefore the plaintiff says that said Section 6274 and [fol. 660] said Section 6283, and each of them in anywise empowering him, the said Superintendent to refrain from and withhold his approval for an indefinite period fo time and not seasonably to act, and said Section 6281 purporting to impose penalties upon the plaintiff for exacting such increases, and each of them, as the same are thus undertaken to be applied to it, the plaintiff, and the refusal of said defendant to give sanction to rates of the plaintiff or permit it to proceed without such sanction deprive it, the plaintiff, of its property without due process of law, in violation of Section 1, of the Fourteenth Amendment to the Constitution of the United States.

(ff) And plaintiff says that by Section 6274, Revised Statutes of Missouri, it is provided that any proposed increase of rates by insurance companies shall be made effective only after ten (10) days' notice to the Superintendent of the Insurance Department of the State, and that his approval thereof shall be had before the same becomes effective. And plaintiff further says that no means is provided in said Statute to enforce or compel action of the Superintendent or to cause or compel him to grant such approval or extend the same to the applicant even if the insurance company applying therefor be clearly entitled thereto, and no provision is made by the laws of said State for reviewing his refusal to give his approval to a proposed increase of rates, but to the contrary it has been held by the Supreme Court of Missouri, the highest Court of said State, that his action may not be compelled [fol. 661] and no judicial review is provided, permitted or granted by said Statute or otherwise to review his failure and refusal of action. And the plaintiff says that it did determine upon and make a filing of increase of 10% upon

fire insurance rates and upon windstorm and tornado rates in the State of Missouri by its action of December 30, 1929, and did immediatedly give notice thereof to the Superintendent of the Insurance Department of the State of Missouri, and the said Superintendent has had no hearing nor given notice of any hearing nor given an opportunity to plaintiff to justify its said increase, and has failed entirely to act upon or make any finding as to the propriety of increase of rates upon such classes of insurance, but so to do has failed and refused and still fails and refuses, and no judicial review of his said failure and refusal is in anywise provided by the laws of Missouri.

Wherefore, the plaintiff says that the said Section 6274 is null and void and wanting in due process of law, and the same and the conduct of the Superintendent pursuant to it operates to deprive it, the plaintiff, of its property without due process of law, in violation of Section 1, of the Fourteenth Amendment to the Constitution of the United States.

(g) And the plaintiff further says that the defendant, Joseph B. Thompson, Superintendent, has failed seasonably to act upon and rule upon the notification of increase by plaintiff, to him given, respecting increase of De- [fol. 662] cember 30, 1929, and, although more than a year has elapsed since the filing of said notice with him, said defendant has not made any finding whether or not fire insurance rates were compensatory as to it, the plaintiff, or whether or not tornado and wind storm rates were compensatory as to it, the plaintiff, nor has he at any time made any finding that the increased rates upon such classes as so made by plaintiff were excessive or exorbitant or productive of undue profit to it, nor has he in anywise found what would be a reasonable profit upon such classes, nor has he in anywise found that existing rates upon such classes, without application of said increase, were adequate, nor has he made any findings of adequacy or inadequacy of rates, or reasonable or unreasonable nature of increases upon such classes either as to plaintiff or as to all companies in the aggregate. And plaintiff says there are no findings by him made or facts presented before or to the Superintendent in anywise justifying denial of increases to plaintiff.

And it, the plaintiff, says that in truth and in fact it will have less than a reasonable profit upon its said business upon each of said classes and upon the whole of its business in said state, with said rate change and increase applied, but the defendant, the said Superintendent, to in anywise weigh or consider the experience of the plaintiff upon either fire insurance or upon windstorm insurance, or upon all classes of business upon any basis whatsoever, or the experience of all companies as to fire and windstorm classes wholly failed, neglected and refused, and still fails, neglects and refuses, and to the contrary asserts and claims that he is warranted by the said statutes, namely, Section 6274, Revised Statutes of Missouri, 1919, and Section 6283, Revised Statutes of Missouri, 1919, as amended in 1923, from in anywise considering and the experience of the plaintiff either upon fire insurance or upon windstorm insurance, or upon all classes of business, but that he, the said defendant, is warranted in denying and disapproving any increase solely and exclusively upon consideration of some kind of aggregate experience of all companies in the state, upon all classes without regard to or consideration of the individual experience of it, the plaintiff, upon said classes or upon its whole business, or aggregate experience upon such classes. And it, the plaintiff, says that the defendant, in his said order, which he, the said defendant, regards and designs and intends to be a final determination as respects the plaintiff, did not consider or in anywise weigh the experience of the plaintiff in anywise, either upon its business of fire insurance, or upon its business of windstorm insurance, or upon its business of insurance on all classes in the State of Missouri, but asserts and claims and did by his said order assert and claim that by the said statutes he is in nowise empowered to, or authorized to, or required to approve or consider or weigh the propriety of increase as respects it, the plaintiff, [fol. 664] as to classes or upon the whole or as to all companies by classes. And he, the said Superintendent, asserts and claims, and by his order of May 28th asserts and claims, that the plaintiff is bound to abide by his said denial of increase and to write said business of fire insurance and windstorm insurance at a loss and without any profit whatever, and that although the said increase is and would be reasonable upon a consideration of experience of the plaintiff and upon consideration of the

experience of the plaintiff weighed with the experience of other companies doing like business in Missouri upon said classes, yet defendant, the superintendent asserts that the plaintiff should be and may be compelled to do its business without any return whatsoever for the writing of fire insurance or windstorm insurance, because supposed earnings of other insurance companies, competitors of it, the plaintiff, and over whom the plaintiff has no power or control, disclose that the competitiors of it, the plaintiff, or some one or more of them have made a supposed profit in the state upon other classes of insurance or upon their investments.

And the plaintiff says that he, the said defendant, did, by his order or ruling of May 28, 1930, make supposed findings as to experience upon all classes of all stock fire insurance companies in the aggregate, but said findings were without support of any evidence, made without notice or hearing and said findings were unsound and un-
[fol. 665] true in fact.

And it, the plaintiff, says that the provisions of section 6283, Missouri Revised Statute, so undertaken to be applied to it, the plaintiff, have been construed by the Supreme Court of the State of Missouri, the highest court of said State, to require and permit as a reasonable profit of stock fire insurance companies upon the aggregate a profit of 8% upon written premiums above outgo.

And plaintiff says that the said defendant, in finding the said supposed profit as erroneously and arbitrarily found, acted upon a supposed experience of stock fire insurance companies for the five-year period in question, without making true and just application of such experience. Under his directions a reduction of rates upon fire insurance and tornado and wind storm insurance was made in August, 1929, which reduced level of rates so reduced 10% by virtue of such filing, was in force and effect continuously to the time of the making of said increase of December 30, 1929, so by the plaintiff made.

And plaintiff further says that the premium income so by the defendant recited as the supposed income of stock fire insurance companies during said test period, was upon the basis of the income derived, without application or adjustment arising out of such reduction of August, 1919, and plaintiff says that the increase so by it proposed and

promulgated is operative to increase income upon said classes 5% only above the level of rates existing during [fol. 666] said test period aforesaid, and that had the Superintendent considered the reduced level of rates applied to said experience figure (as the reduced level in fact existed immediately prior to the promulgation of the said increase), the supposed profit by him found would be entirely wiped out and a great deficiency of income to meet outgo substituted therefor.

And plaintiff says that the said increase so promulgated by it, the plaintiff, was simultaneously promulgated also by other stock fire insurance companies doing business in Missouri, and that the said increase of plaintiff and other insurers so put into force would be productive, upon the said experience of said test period, of a return or a profit far less than a profit of 8% upon written premiums, so construed and held by the Supreme Court of Missouri to be a permissible, reasonable and sound profit.

And it, the plaintiff, says that in truth and in fact it, the plaintiff, is entitled to, and other stock fire insurance companies are entitled to a larger measure of profit than that so by the Supreme Court of Missouri declared to be reasonable and sound. But, nevertheless, plaintiff says that said increased rates so by it proposed and promulgated will be productive, as evidenced by the experience of said test period, of a profit much less than the amount so held and determined to be a reasonable measure by the Supreme Court of Missouri.

[fol. 667] Wherefore, plaintiff says that the defendant, Joseph B. Thompson, superintendent, has failed to pass upon and determine, the propriety of said rate filing or soundly to apply or perform his duties respecting supposed approval or disapproval of rate filings and has failed lawfully and constitutionally to apply and construe section 6274 and section 6283 of the revised statutes of Missouri, but, to the contrary, has partially, unjustly, unlawfully and unconstitutionally applied the said law to the plaintiff and has failed to take action so required of him to avoid the confiscation of the property of it, the plaintiff. And in so finding the said proceeds of rates aforesaid by him found in said order, to be adequate, and in so holding existing rates independent of said increase, to be adequate and sufficient, and in so failing to consider the adjustment by virtue of the changed and altered level of rates

aforesaid, and by failing to make any findings respecting the adequacy of fire insurance rates, or of tornado and wind storm rates, and undertaking to fix and determine the rates of the plaintiff upon such inadequate and insufficient facts, findings and conclusions, he has made an unlawful, unconstitutional and void order and the same ought to be set aside.

The plaintiff says that the said action of the superintendent as aforesaid is in violation of Section 6274 and of Section 6283 Missouri Revised Statutes and of Section 1 of the 14th Amendment to the Constitution of the United States, in that it deprives it, the plaintiff, of its [fol. 668] property without due process of law.

(h) Plaintiff says that said Section 6274, Revised Statute of Missouri, and said Section 6283, Revised Statute of Missouri, and each of them was construed by the defendant, Joseph B. Thompson, Superintendent, in making said order and in considering said rate filing of plaintiff to give him the power of direction and control of the method and manner of the conduct of the business of the plaintiff, and the expenditures which it ought reasonably to make in and about the conduct of its affairs and the commissions it ought to justly pay to its agents, and whether or not the plaintiff might conduct its affairs by some other method of manner than it does conduct the same, and that the discretion in the management and conduct of plaintiff's affairs as to commission arrangements with the agencies in which it will engage in business and the compensation to those performing services for it and the salaries and expenditures in and about management of the companies' business for its officers and employees are, under the claim and construction of the said Thompson, matters which may justly be controlled and regulated by him and that he is the virtual manager of plaintiff's said business, and his discretion and judgment supersede that of the officers and directors of the plaintiff and those persons to whom the stockholders of said companies have entrusted their affairs. And, so construing the [fol. 669] said statutes and so taking the power thereunder as he so construed it to be he applied the same to the plaintiff by his said order of May 28, 1930, in that in his considerations therein he has disallowed and eliminated great sums from outgo items in fact expended within the

discretion of officers of stock fire insurance companies and their managers, and has thereby reduced outgo experience figures upon such considerations and has greatly enhanced and enlarged the income experience figures as the same were in fact, by a process of taking into account items of supposed income which would or might have been had, had the conduct of the affairs of plaintiff and other stock fire insurance companies been conducted otherwise than they were in fact.

And the plaintiff says that in his said actions and each of them the superintendent has undertaken such regulatory powers without any guide or rule, but upon the comprehensive claim and assertion by him, that he might exercise his discretion according to his own whim, caprice, and unregulated judgment. And the plaintiff says that the said statutes aforesaid as so construed and as so applied to the plaintiff, and the powers so pretended to be applied against the plaintiff by means of said rate order aforesaid, are not powers by law to him delegated, and are not powers which may, under constitutional principles, be remitted to him, but the plaintiff says that such matters soundly rest in the judgment of the officers and managers of the plaintiff and other stock fire insurance companies in like situation and that the reasonable reg- [fol. 670] ulation of the State, because of the public nature of the business of the plaintiff, ought not to subject plaintiff's property to the domination of him, the said defendant, as if it, the plaintiff, had dedicated its property to the public use. Plaintiff says that its business is a private business, arising out of the subscription of capital voluntarily made for personal purposes of profit, and that the said actions of the superintendent as aforesaid are, and each of them is a taking of the property and the right of contract of it, the plaintiff, without due process of law, in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

(i) Plaintiff says that the defendant, Joseph B. Thompson, superintendent, has in his said order of May 28, 1930, found that the income of stock fire insurance companies in said State for the period 1924 to 1928, inclusive, was $115,428,623.00. It, the plaintiff, says that the income for said period of said stock fire insurance companies was not the said sum but an entirely different and variant sum and was the sum more particularly set forth in the

tabulation of aggregate experience of all companies contained in paragraph 6 of this bill foregoing.

And he, the said defendant, did find that the 'losses paid and expenses of said company chargeable to said business amounted to $110,672,997.00'; and plaintiff says that the losses paid and expenses of said companies were an entirely variant and larger sum and, in fact, were in the [fol. 671] sum as set out in the table of aggregate experience in the paragraph of the plaintiff's bill aforesaid. And the plaintiff says that the said superintendent did by his said order find that the 'said companies had a net profit during said period on the Missouri business of $4,755,626.00.' And plaintiff says that the said companies did not have any net profit in said sum or in any other sum but suffered a loss upon the conduct of their business, as more particularly set out in the foregoing paragraph of the bill of complaint. And the plaintiff says that there was no evidence in anywise presented, heard, admitted or considered by him, the said defendant, in anywise supporting, disclosing or tending to disclose experience as by him so found and no notice of hearing, or any hearing at which plaintiff was or had opportunity to be present. And plaintiff says that the said findings were without evidence and entirely unsupported in anywise by anything appearing, presented to, or properly or soundly to be considered by him, the said defendant, that therefore the conclusions and finding of supposed adequacy of existing rates and the finding respecting supposed excessiveness of increase promulgated as aforesaid, are all findings and conclusions which are and should be declared null and void, and in no wise binding upon the plaintiff, and the same and each of them are confiscatory of the property of the plaintiff and operative to deprive it, the plaintiff, of its property, without due process of law.

[fol. 672] Wherefore, the plaintiff says that the said order of May 28, 1930, and each and every of the findings therein made, ought to be declared null and void and of no effect, and operative to deprive it, the plaintiff, of its property, without due process of law, in violation of Section 1, of the 14th Amendment to the Constitution of the United States.

(j) Plaintiff further says that it is informed and believes, and therefore states the fact to be that the defendant, Joseph B. Thompson, superintendent, in the making of his said order of May 28, 1930, did include and take into account as supposed income certain items styled and termed 'interest on unearned premium,' and plaintiff says that defendant was not entitled or warranted to take said item into account, and the same ought not justly to be taken or treated as income, and, by virtue of the taking into account of such improper item, a purported or pretended profit is found, which, but for such item or element, would not exist.

And plaintiff says that it is unable to state the exact amount so taken into account but states that the same was in the sum of between two and four millions of dollars, and plaintiff says that in so taking said item into account the said superintendent acted arbitrarily and unreasonably and in a confiscatory manner, in that unearned premiums are and constitute a liability of insurance companies, and the allowance of or consideration of interest is in no wise provided for in the policies of insurance [fol. 673] issued by plaintiff and other stock fire insurance companies to their respective policyholders; that the setting up of unearned premiums is a sound and reasonable method of setting up liabilities to segregate the premium income, as between that which has been earned and is justly to be considered as applicable for the period under consideration, and the portions of it unearned, or which remain, as a liability for the future. But the plaintiff says that the liability so set up is a liability only in the sense that capital and surplus are set up as liabilities in an account, and operates as a setting out of a portion of the surplus upon the books and records, and plaintiff says that the plaintiff and other fire insurance companies doing business in Missouri during said test period had cash disbursements upon the conduct of their business of insurance in the State in excess of their cash receipts, and there is and was no sum subject to interest earnings properly to be considered as income, but, nevertheless, he, the said defendant, did take and treat income supposedly earned on the entire liability so set up, although no earnings in fact accrued therefrom. And plaintiff further states that income, if any, derived by insurance companies from investments of a portion of their assets ought not soundly to be taken into account as any

supposed income in a measurement of rates or fixing a rate level, in that the hazards incident to the letting out of and lending of said money are hazards wholly assumed by stockholders and not by policyholders, and any profit [fol. 674] or return derived therefrom should justly be regarded and remain the property of stockholders, and not as income accruing to the benefit of policyholders.

Wherefore, the plaintiff says that Section 6274 and Section 6283 and the Superintendent in his rate order by his arbitrary and unreasonable and confiscatory method and manner of setting up and declaring accounts, and thereby adversely effecting the statement of account as against it, the plaintiff, said defendant did infringe upon the constitutional rights of it, the plaintiff, and did take action, the consequence and effect whereof if not restrained is to deprive it of its property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(k) And plaintiff further says that said rate order of the Superintendent of the Insurance Department of the State of Missouri, by him made on May 28, 1930, as above set forth in the fourth paragraph of this bill, is null and void under the laws of the state of Missouri, in that the plaintiff says that:

No power was given to, or existed in him, the said Superintendent, to act adversely upon the increase of the plaintiff by the directions of the statutes giving power to him, except at most only:

(a) -- Upon consideration of rates charged by stock fire insurance companies for the five years next preceding the investigation.

[fol. 675] (b) -- If, upon investigation thereof, the same were producing a profit in excess of what was reasonable.

(c) -- To make reduction or restrain an increase only within the limit of rates which would produce a fair and reasonable profit only.

And plaintiff says that rates charged in the said State of Missouri by stock fire insurance companies for the five years preceding were productive of net premiums written and losses and expenses paid, as more particularly in the sixth paragraph above set out, and produced a loss of $16,597,725.00 during said period; that if interest or un-

earned premium were additionally taken into account, the same would reduce such loss by such addition to income by not exceeding $2,336,560.00, and that even upon such calculation a deficiency of income to meet outgo would be in excess of $14,000,000.00 for said period.

And plaintiff further says that even though the finding respecting income and losses and expenses and profit as by the superintendent recited in his said order of May 28 were true (and plaintiff says that they are untrue, false and unsupported by the evidence), nevertheless, the plaintiff says that the said order would be, and is, unjustified, even upon the findings therein contained; and the plaintiff says that by direction of the Superintendent the level of rates upon fire and windstorm insurance was in August, 1929, reduced 10% from the level existing in 1924-5-6-7-8 and that the level of rates existing immediately prior to [fol. 676] December 30, 1929, stood reduced 10% from the rate exacted during said period, 1924 to 1928, inclusive, and that the increase so made by plaintiff on December 30, 1929, was operative only to produce an increase of 5% on the classes so affected by its said rate filing, and that upon the making of such increase, stock fire insurance companies would have an increased cost for commissions and taxes in excess of 2% on premiums. And plaintiff says that the increased amount of such income by virtue of rate increase when added to the net profit so by the superintendent found to have been derived, having consideration for the reduction in rates intervening and making due allowance for the incidentally increased expense, as aforesaid, is, by application of said increase, productive of an amount of profit, upon the basis of calculation so employed by the superintendent, of less than 8% upon the net written premiums, and, therefore, within and less than the profit which has been declared by the Supreme Court of Missouri to be reasonable upon a rate adjustment. Wherefore, plaintiff says that the said order of the superintendent is not justified or warranted by law and ought to be declared null and void.

(l) And plaintiff says that the defendant, the superintendent, was bound by law to give separate consideration to the experience as respects fire insurance and as respects tornado and wind storm insurance, and separately define compensatory and self-sustaining charges

proper to be made upon such classes respectively. And [fol. 677] the increases so by plaintiff made, being upon said classes inclusive of said increases, did not exceed just compensation for the carrying of the hazards of said respective classes. But to give his approval or disapproval thereof, as to said classes the said defendant, the superintendent, wholly failed regardless of his duty in the premises, and in violation of the intent and meaning of the said statutes, and regardless of the reasonable intendment thereof, made no findings and made no ruling respecting said separate classes, and the propriety of the increase of rates applicable thereto, but, nevertheless, asserts and claims that the plaintiff is debarred from putting its increases in force, notwithstanding that he asserts and claims that he, the said defendant, is not bound by law to determine or consider the compensatory or noncompensatory character of the rates upon said classes as so proposed by the plaintiff.

Wherefore, the plaintiff says that the said order of May 28, 1930, ought to be declared in violation of law and equity and not in accordance with the intent and meaning of said statute, and whereas no power exists under the laws of Missouri to compel or enforce action of the superintendent upon such proposed increase, and whereas he was evidenced the intention not to act upon the same, therefore, this Court ought to enjoin him from interfering with the increase so by plaintiff made, and to hold and declare that any further or other application [fol. 678] or notice or requirement of hearing before him ought to be dispensed with and the said increase be collectible, without requirement of any further or other application to or approval by the said superintendent, but in equity he ought to be declared by his said conduct to have given his approval.

(m) And plaintiff further says that by the terms of said Section 6311, Revised Statutes of Missouri, 1919, the institution of this suit in a federal court against a citizen of the state of Missouri is of itself declared by the said statute to create the duty of the Superintendent of the Insurance Department to forthwith revoke all authority to the plaintiff to do business in the state of Missouri and to debar it from again entering or being permitted to do business in the state at any time within five years from the date of said revocation.

And it, the plaintiff, says that said Section 6311 is null and void, and in contravention of Section 2 of Article III of the Constitution of the United States, providing for the extent of the judicial powers of the courts of the United States; wherefore it, the plaintiff, says that the said statute and the terms and provisions thereof, and the supposed power and duty, cast upon the Superintendent of the Insurance Department of Missouri by the said section of Missouri statutes, and the exercise of such power by the defendant, Superintendent, which he threatens to and will unconstitutionally exercise against plaintiff if [fol. 679] not restrained and enjoined are, and each and all of them are, in contravention of the Constitution of the United States and the rights of the plaintiff thereunder.

(n) And the plaintiff further says that by the provisions of Section 6287 of the Statutes of Missouri, if the plaintiff proceed to collect and charge premiums in accordance with the increase so by it made and filed, and notice whereof was given the said defendant, superintendent, as provided in Section 6274, the defendants will proceed, unless restrained by this Honorable Court, to impose upon the plaintiff the penalties of said Section 6287, namely, will assert a violation of the provisions of the said statutes and the said defendant, Superintendent of the Insurance Department of the State of Missouri, will, if not restrained by this Honorable Court, revoke the license of it the plaintiff, and its agents, in the State of Missouri, who are also subject to and have licenses from the State of Missouri; and in addition the defendant, the Attorney General of the State of Missouri, will assert and maintain that plaintiff and its agents were and are guilty of infraction of said statute, and will prosecute plaintiff and its said agents for misdemeanor, and cause to be imposed upon it and them by proceedings in the courts of Missouri, fines not exceeding five hundred dollars ($500.) for such offense, and will treat the issuance of each policy of the plaintiff as a distinct offense. And it, the plaintiff, says that it, the plaintiff, through its [fol. 680] agents in the State of Missouri, issues many policies each day, and the said defendant, Attorney General of the State of Missouri, will assert and claim that said premium charges so exacted at increased rates are productive of a discrimination which he will assert is unlawful, and that the same is at a higher and greater

rate than was theretofore exacted upon insurance of the same property against like hazards, and will proceed against the plaintiff and its agents for a fine, as provided by said statute, 'not to exceed $500.00'; and will proceed against the agents of the plaintiff in that behalf, and assert and prosecute in the courts of the state proceedings whereby said agents of the plaintiff will be imprisoned under the provisions of said statute providing under such circumstances for 'imprisonment in the county jail for a term not exceeding ninety days,' and will in other cases proceed for both fine and imprisonment, as by said statute provided.

And it, the plaintiff, says that the penalty provisions of said statute are so extreme and great, and so out of proportion to any offense involved, and so designed and intended to prevent the plaintiff from asserting its lawful rights in charging and exacting premiums which justly it ought to be permitted to charge, that the plaintiff dare not, without protection of this Court, proceed to put its increase into effect and risk the severe and excessive penalties by said statute provided.

And it, the plaintiff, says that because of the dispro- [fol. 681] portionate, excessive and unwarrantable nature and amount of said penalties, and because action of the plaintiff in proceeding to test and determine its rights by placing its increase in force without the protection of this Honorable Court, would involve the plaintiff's business in Missouri in ruin and expose it to drastic and extreme penalties, and because the action which the plaintiff proposes and intends to take under protection of this Court to put its said increase in force is not forbidden by any lawful act but forbidden only by the unconstitutional statutes aforesaid, namely, Section 6274 and Section 6283; now, therefore, the plaintiff says the said Section 6287 of the Statutes of Missouri as and if applied to plaintiff because of putting its said increase in force is unreasonable, arbitrary, unconstitutional and void, and deprives it, the plaintiff, of its property and its liberty of contract without due process of law, in violation of the First Section of the Fourteenth Amendment of the Constitution of the United States.

FOURTH.

Unless this Court grants the relief herein prayed for, and unless the plaintiff exacts and collects the increased rates, as aforesaid, and is protected against the action of the defendants and interference on their part with such collection on and after June 1, 1930, the plaintiff will sustain irreparable injury and damage, in that the plaintiff will on and after June 1, 1930 either be compelled to issue policies of insurance and conduct its business of fire in-
[fol. 682] surance and windstorm insurance in Missouri at a financial loss to the plaintiff, and upon a rate of income inadequate to meet the expense of the conduct thereof, and without any reasonable profit and without any profit whatsoever on such business, or alternatively to cease the doing of such business in Missouri and thereby lose its agency contracts, agency plants, established business, maps, surveys, rating records and goodwill aforesaid, and the entire value thereof, which rights and property of the plaintiff are of great pecuniary value. And upon knowledge of commencement this suit and upon gaining knowledge that plaintiff has directed its agents to put said increase in force on June 1, 1930 and if the plaintiff proceed to collect, enforce and apply such increase, the defendant, Joseph B. Thompson, will, unless restrained, proceed to revoke the license of the plaintiff and of its agents in Missouri to do business in said state; and the defendants, said Superintendent, and said Attorney General, will institute and cause to be instituted, and the said Attorney General will prosecute, or cause to be prosecuted, criminal action against the plaintiff and its hundreds of agents in the state of Missouri; and if the plaintiff, and its said agents, will be subjected to numerous prosecutions to recover many thousands of dollars in fines and penalties accumulating as against it, the plaintiff, in the sums of many thousands of dollars; and the agents of the plaintiff will be subjected to prosecu-
[fol. 683] tions and jail sentences, and the threat and fear of cancellation of licenses, and proceedings for fines and proceedings for imprisonment of the plaintiff's agents will operate to put them in great fear and will cause many of them to refrain from accepting, receiving and soliciting business for the plaintiff, as otherwise they would do.

And it, the plaintiff, says that the actual loss to it, the plaintiff, if the said increase in rates aforesaid be not put into effect and collected and the gains prevented as to

it, the plaintiff, will, during each day of continuance of its business in the state of Missouri, cause a loss and a diminution if interference with such increase be not enjoined, amounting to not less than fifty dollars each day that plaintiff may be required to write its insurance at reduced or preexisting rates, free of such increase.

Par. 2. The defendants have threatened, and unless restrained and enjoined by this Court, will take unlawful and unconstitutional action against and interference with the business of the plaintiff in the following particulars:

Each defendant has asserted, and if not enjoined will assert and publish and state to the insuring public of Missouri, that the premium charges at the rates to which plaintiff has increased them and on and after June 1, 1930 proposes to exact and charge, namely, inclusive of the increase of sixteen and two-thirds per cent upon fire insurance and upon windstorm insurance, and which the [fol. 684] plaintiff proposes to exact upon its said contracts of fire insurance and its contracts of windstorm insurance, are unlawful; and the defendants have asserted, and will assert and publish and declare to the insuring public of Missouri, that they need not pay, or contract to pay, the same to the plaintiff, whereby many persons will be induced to refuse and decline to take insurance with the plaintiff and to pay to the plaintiff premium charges which it may lawfully demand and will demand and exact upon insurances on properties in this state. And unless restrained and enjoined the defendants will bring or cause to be brought proceedings to enjoin or interfere with and otherwise hamper the collection by the plaintiff of such premium charges, and will cause actions and proceedings to be brought against the plaintiff, against its officers, directors, employes and agents, in which said proceedings numerous and excessive fines and penalties prescribed by the laws of Missouri, for violation of the insurance laws of said state respecting rates, will be imposed, and each issuance of a policy by or on behalf of the plaintiff will be treated and asserted to be a separate violation of law, and each exaction of premium upon each policy of the plaintiff will be treated and asserted to be a separate and distinct offense against the law, subjecting the plaintiff and its agents to penalties, and each application of such increased rate will be treated and asserted to be a separate and distinct offense. And the defendants will bring, or cause to be brought, actions to

[fol. 685] impose fines upon the plaintiff and actions to impose fines and imprisonment upon agents and representatives of the plaintiff; and the defendant, the Superintendent of Insurance, will undertake revocation and cancellation of the license of the plaintiff and its agents; and the defendants, the said Superintendent and the said Attorney General, will bring or cause to be brought proceedings before the Superintendent of Insurance and before courts of the state of Missouri for revocation and cancellation of the licenses of the plaintiff and its agents; and the defendant, the Attorney General, will prosecute such actions and proceedings or cause the same to be prosecuted. And unless restrained and enjoined the defendant, the Superintendent of Insurance, will refuse renewal of licenses to the plaintiff and to its agents upon the expiration of such licenses, many of which said licenses will, in the near future, became the subject of annual renewal and have in past years been, from year to year, renewed. And by said threatened and proposed actions of the defendants, which said actions and each of them will be taken, instituted, prosecuted and sought to be imposed upon the plaintiff and its agents, will, and each of them will, be sought to be imposed because of the action of the plaintiff in so lawfully and justly increasing its rates and for bringing this suit in a federal court, and such proposed actions, and each of them, are violative of the lawful and constitutional rights of it, the plaintiff, and [fol. 686] said actions, and each of them, so proposed and threatened to be made by the defendants, will be founded upon and based solely upon the unconstitutional statutes aforesaid and the unconstitutional provisions thereof. And by such proposed and threatened actions of the defendants, the plaintiff will be subjected to great and irreparable loss and damage, and it, the plaintiff, and its officers, employes and agents, and each of them, will be subjected to a multiplicity of suits, and such proposed and threatened actions and proceedings of the defendants would, and each of them as so threatened and proposed will, be a trespass by the defendants without any lawful or constitutional authority in law and under void and unconstitutional laws, statutes and departmental proceedings. And the plaintiff says that the defendants do not, nor does either of them, have sufficient financial responsibility to answer adequately in the damages which the plaintiff would sustain by their said actions, and have not sufficient financial

responsibility to meet and pay the damages which will be suffered by other stock fire insurance companies against whom such proposed and threatened actions will be simultaneously taken and had and thereby exhaust the financial responsibility of defendants. And it will be wholly impossible, adequately and legally, to measure the amount and extent of the damages of the plaintiff for such wrongs and such conduct and actions of the defendant, and each and every of such proposed and threatened actions and proceedings will deprive the plaintiff of its property and [fol. 687] its liberty of contract, without due process of law, and deny to it, the plaintiff, the equal protection of the laws guaranteed to it, the plaintiff, by the first section of the Fourteenth Amendment of the Constitution of the United States.

Plaintiff has no plain, adequate or complete remedy at law and no relief can be afforded to the plaintiff from the operation and effect of such arbitrary, confiscatory and unconstitutional actions and proceedings of the defendants, as so threatened and proposed to be had against the plaintiff and its property, save only in a federal court of equity, and unless such relief is granted the property of the plaintiff will be confiscated and it, the plaintiff, will suffer irreparable loss and injury. Immediate and irreparable injury, loss, and damage will result to plaintiff unless a temporary restraining order is granted and unless the same is granted without notice and unless an interlocutory injunction is granted in this: that if the plaintiff should comply and conform with the demands and conform to the views of the said Superintendent of Insurance and on and after June 1, 1930 write its insurance upon fire and windstorm risks at the preexisting rates and without collecting, demanding and receiving increases so above mentioned, plaintiff will be entirely unable to collect, receive or demand the same thereafter; will be required to execute and carry out its contracts and the obligations thereof without receiving and collecting com- [fol. 688] pensatory rates, namely, rates at the increased rate according to filing of December 30, 1929; and the plaintiff would be debarred from any relief because of the confiscatory, illegal and unconstitutional demands and burdens so sought to be imposed on the plaintiff by the defendant, Superintendent, and so imposed by the said unconstitutional statutes aforesaid. And if the said unlawful and unconstitutional demands and requirements of

the Superintendent and the provisions of said unconstitutional statutes are imposed as against the plaintiff, the premiums representing the difference between the rates of premium so collected at the lower rate and the rates of premium which plaintiff is legally entitled to receive as aforesaid would be wholly lost to the plaintiff and the plaintiff would be required to do business at a confiscatory and inadequate rate, causing a loss to it from day to day in the state of Missouri, upon each of said classes, amounting to not less than twenty-five dollars each day upon each class, namely, fifty dollars each day upon fire and windstorm insurance, which would be irreparably lost to the plaintiff.

The temporary restraining order herein prayed for should be granted by this Court without notice to the defendants, because immediate and irreparable injury and damage will result to plaintiff before notice can be served on said defendants and a hearing had in this:

If defendants receive advance notice of plaintiff's ap- [fol. 689] plication for a temporary restraining order, the defendants will, before the hearing, have it within their power and they will proceed to enforce the said void and unconstitutional statutes and the provisions thereof against the plaintiff; and will institute a multiplicity of suits against the plaintiff on each of the grounds of supposed violations aforesaid; and will proceed to revoke the licenses of plaintiff, its agents and representatives, to do business in Missouri, on the alleged ground that plaintiff was proceeding in violation of the said statutes of the State of Missouri.

Wherefore, the premises considered, plaintiff prays:

Par. 1: That subpoena may issue against the said Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri, and the said Stratton Shartel, Attorney General of the State of Missouri, who are made parties defendant hereto, to appear and they be required to make full and direct answer to this bill, but not under oath, answer under oath being hereby waived.

Par. 2: That it be ordered, adjudged and decreed:

(a) That Sec. 6274, Revised Statutes Missouri 1919, and Sec. 6283 Revised Statutes Missouri 1919, as amended

in 1923, and Sec. 6287, Revised Statutes Missouri 1919 and Section 6311 Revised Statutes Missouri 1919 and each of said sections as same respectively are written and as they and each of them are construed by the Superintendent and as they are by him sought to be applied to [fol. 690] and against plaintiff by order of May 28, 1930 are wanting in due process of law and are unconstitutional and void and contrary to and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and Section 30 of Article II of the Constitution of the State of Missouri and said Section 6311 is in violation of Section 2, Article III of the Constitution of the United States.

(b) That the failure, neglect and refusal of the said Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri, to grant and give an approval to the plaintiff of its increase of rates of sixteen and two-thirds per cent upon fire insurance rates, and of sixteen and two-thirds per cent increase upon windstorm insurance rates, and the action of the said Superintendent of Insurance in requiring the filing with him for approval and the requirement that approval be had before the said rate increase becomes effective, and his failure seasonably and reasonably to rule upon said increase, and his said order of May 28, 1930 and his ruling and action therein and thereby without notice or hearing and without any evidence to support same and upon arbitrary basis there employed, and each of his said actions, is, as against the plaintiff, unreasonable, confiscatory, unconstitutional and void, and that said acts, and each of them, and said refusal and failure to act on his part, and each of them, deprive it, the plaintiff, of its liberty of contract and deprive it of its property without due process of law, and [fol. 691] deny to it, the plaintiff, the equal protection of the laws, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and Section 30 of Article II of the Constitution of Missouri.

(c) That the proposed and threatened action of the defendants, and each of them, whereby they propose to subject the plaintiff, its directors, officers, agents, employees, or any of them, to actions for penalties or fines or imprisonment or revocation of licenses because of plaintiff's action in putting into force increases of December 30, 1929 effective June 1, 1930 or any action or proceeding designed to enforce against the plaintiff any of the

said statutes in this paragraph (a) above recited because of exacting said increase or because of bringing this action or any actions under and pursuant to or enforcement of them, or any of them, deprive it, the plaintiff, of its liberty of contract and of its property without due process of law; and deny to the plaintiff the equal protection of the laws, in violation of the rights of the plaintiff under Section 1 of the Fourteenth Amendment to the Constitution of the United States and Section 30 of Article II of the Constitution of the state of Missouri.

Par. 3. That the Court make a temporary restraining order (without notice to the defendants if the Court be so advised), to be effective until the hearing upon plaintiff's application for an interlocutory injunction, and that [fol. 692] upon hearing of application for an interlocutory injunction that an interlocutory injunction issue and that by the said temporary restraining order and that by the said order for interlocutory injunction the defendants, Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri, and Stratton Shartel, Attorney General of the State of Missouri, and each of them, and their deputies, attorneys, solicitors, agents, servants and representatives, and all other persons acting or claiming or assuming to act for or under the authority of said defendants, or either of them, and all other persons who now seek or attempt, or who shall hereafter seek or attempt, to interfere with or abridge the right of the plaintiff, or do any act in any wise militating against the right of the plaintiff on and after June 1, 1930 to collect, demand, receive, and retain premium charges upon fire insurance and premium charges upon windstorm insurance at the rates created and made by filing of December 30, 1930 (namely, an increase upon each of said classes of sixteen and two-thirds per cent above the level of rates obtaining prior to that time), and that the said defendants and the other persons aforesaid, acting, claiming or assuming to act for or under them, be restrained and enjoined from taking any proceedings whatever under Sec. 6274 or Sec. 6283 or Sec. 6287, Rev. St. of Mo., or any powers claimed or asserted thereunder, and from advising, instituting, prosecuting or aiding in any action, [fol. 693] suit or proceeding, or otherwise to enforce the said statutes mentioned, or exercise or use the powers therein purported to be granted, or otherwise to act in derogation of the increase of rates initiated on December

30, 1929, and provided to be effective June 1, 1930; and be restrained and enjoined from so proceeding against the plaintiff or against any of its officers, agents or employes of the plaintiff, or against Missouri Inspection Bureau or its managers, which Bureau is an agency of the plaintiff, or from giving or enforcing any orders or directions to said Missouri Inspection Bureau in any wise calculated to enforce or make effective any directions or powers of said statutes aforesaid, or any powers asserted to exist by virtue of the laws of the state of Missouri affecting rates or premium charges of the plaintiff upon fire or windstorm insurance in derogation of the said filing and increase of rates aforementioned; and the said defendants and all others, as recited, acting under, for or through them, be restrained and enjoined from proceeding to recover from or to impose or enforce against the plaintiff or any of its officers, directors and United States managers, employees, attorneys in fact, agents, adjusters, inspectors, rating bureaus, inspection bureaus or any other person in any wise representing the plaintiff, any fine, penalty, imprisonment, damages or demand for refusal or supposed refusal to obey, observe or comply with the statutes as respects any supposed duty of filing or securing of approval [fol. 694] of the said increase, or from making any direction respecting application of said increase or from proceeding against the plaintiff, its agents or employees in any wise because of exaction on and after June 1, 1930 of premiums by the plaintiff at the said rate level resulting from the filing of December 30, 1929, to be effective June 1, 1930, or to proceed in any wise against the plaintiff or any of its representatives aforesaid because of the delivery, negotiation for or steps taken in the execution and delivery of policies specifying such rates, or in any wise to interfere with, advise, institute or prosecute or aid in any action, suit or proceeding to interfere with, restrain or prevent the plaintiff or any of its officers, agents or employes, from charging, receiving or collecting the rates of premium charged for insurance at the rates so established by the said rate increase and filing; and that the defendants be restrained and enjoined in any wise from proceeding under said Section 6287, Revised Statutes of Missouri, 1919, or from refusing to renew licenses of the plaintiff or any of its agents or representatives, or withholding such licenses upon the ground of any supposed violation by them, or any of them, of the said statutes or

proceedings pursuant or under the same because of said rate increase of December 30, 1929, effective June 1, 1930, and from making any revocation of authority or any proceeding or action for revocation of license of plaintiff or any of its agents or withholding or refusing renewal because of plaintiff's action in bringing this suit in federal [fol. 695] court.

And whereas since the filing of the original bill of complaint herein the defendant the Superintendent of the Insurance Department of the State of Missouri did on May 28, 1930 make his order purporting to disapprove the increase aforesaid although not therein determining said matters as against plaintiff severally, and said defendant has by his answer asserted and stated that he proposes to determine and pass upon the confiscatory effect of said order as respects plaintiff but to the time of filing this amended and supplemental bill has failed so to do; plaintiff prays that if said defendant shall make any further order at any time before final hearing that plaintiff may be permitted to set forth the same and by further amendment hereto show to the court the right in law and equity why plaintiff should not be bound thereby.

That the said Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri, and Stratton Shartel, Attorney General of the State of Missouri, and each of them, and their deputies, attorneys, solicitors, agents, servants and representatives, and all other persons acting or claiming or assuming to act for or under the authority of said defendants, or either of them, and all other persons who now seek or attempt or who shall hereafter seek or attempt to interfere or abridge the right of the plaintiff, or do any act in anywise militating against the right of the plaintiff, on or after [fol. 696] June 1, 1930, to collect, demand, receive or retain premium charges upon fire insurance and premium charges upon windstorm insurance at the rates created and made by filing of December 30, 1929, be restrained and enjoined from taking any proceedings whatever to enforce or make effective against the plaintiff a certain order of the Superintendent of the Insurance Department of the State of Missouri, dated May 28, 1930, withholding and denying approval of rate increase of sixteen and two-thirds per cent (16 2/3%) on fire and windstrom rates of insurance, and be restrained and enjoined from any actions for penalty, imprisonment, revocation of license of it,

the plaintiff, or its agents, or withholding of licenses or renewals of licenses because of supposed violation, failure or refusal of plaintiff to conform with, or abide by, or observe the directions of said order and direction of the Superintendent of the Insurance Department of Missouri of date May 28, 1930, or failure or refusal of the plaintiff to observe, recognize or conform to Section 6274, Revised Statutes of Missouri, 1919, or Section 6283, Revised Statutes of Missouri, 1919, as amended in 1923, or as the same are construed and undertaken to be applied to the plaintiff by the said order of May 28, 1930, by the Superintendent of Insurance so promulgated.

Plaintiff further prays that the interlocutory injunction above prayed for may issue against the defendants upon five days' notice in writing to defendants respectively and to the Honorable Henry S. Caulfield, Governor of the [fol. 697] state of Missouri, of the intended application therefor, enjoining and restraining the defendants above prayed, pending the hearing of this cause and until the further order of this court, and that such hearing be had before a court constituted as by law in such cases prescribed; that temporary restraining order may issue as above prayed without notice, to be effective until the date to be set by the court for hearing of interlocutory injunction motion and may continue in effect until said hearing be had and determination had thereon and that interlocutory injunction heretofore granted pursuant to and under original bill herein may be continued in force without prejudice because of amendment or matter supplemental hereby presented; that upon a final hearing in this cause before a court constituted as provided by law, that said interlocutory injunction may be made permanent and that the Court grant to the plaintiff such other and further relief as to the court seem just and proper, and to equity appertain or to which plaintiff is entitled, and that the plaintiff recover from defendants its reasonable costs herein.

Solicitor for Plaintiff.
231 S. LaSalle St.,
Chicago, Illinois

E. R. Morrison,
Of Counsel.
Scarritt Bldg.,
Kansas City, Mo.

[fol. 698] STATE OF _____

COUNTY OF _____ ss.

Paul W. Terry, of lawful age, being first duly sworn, upon his oath says: That he is agent in this behalf for the plaintiff in the above entitled cause and is authorized to and does make this verification in the plaintiff's behalf, and that the facts stated in the above and foregoing amended and supplemental bill are true.

_____

Subscribed and sworn to before me this ___ day of _____, A. D. 1931.

_____

Notary Public within and for said County and State.

My commission expires _____

Plaintiff's Exhibit 1.

December 30, 1929.

Honorable Joseph B. Thompson,
Superintendent of the Insurance Department of the State of Missouri.

Honorable Sir:

You are notified that the several insurance companies, and each and all of them, the names of which are hereto appended, have this day made changes of their rates, in writing, on their public rating records, maintained in the office of Missouri Inspection Bureau to which they are subscribers, and hereby give you immediate notice of such [fol. 399] changes.

Fire (and Lightning) and Windstorm Rates:

Such changes of rates upon the risks of fire (and lightning), and likewise upon windstorm insurance, are as follows:

An increase of 16 2/3 per cent above the rates now existing as created by filing made under protest, dated August 8, 1929, and filed with you on August 9, 1929.

There is transmitted to you herewith the separate experience of each stock fire insurance company doing business in the State of Missouri during the period 1924 to 1928, inclusive, stating separately the experience of each such company in the State of Missouri, upon

(a) Fire (and lightning);
(b) Windstorm;
(c) Hail;
(d) All other classes;
(e) Total.

Such tabulations contain in separate tables the following information:

Table 1. Written premiums:
Table 2. Paid losses;
Table 3. Paid expenses;
Table 4. Balance as between written premiums, and paid losses and expenses;
Table 5. Such balance with ten per cent reduction applied;
[fol. 700] Table 6. Profit or loss upon basis of earned premiums and incurred losses and expenses;
Table 7. Same as Table 6, with ten per cent reduction applied.

The combined experience of the said several stock fire insurance companies for the same period of time and by classes, showing their experience in the aggregate for the test period, is as follows:

(Excess of losses and expenses over premiums.)

	Fire (Lightning)	Windstorm	Hail	Total of Classes
Earned and incurred basis	$6,290,555	$12,025,414	$100,011	$19,093,659
Written and paid basis	$1,729,804	$ 9,642,237	$ 98,503	$10,763,063
With 10% reduction applied:				
Earned and incurred basis	$9,734,489	$12,746,789	$140,424	$23,295,381
Written and paid basis	$6,784,186	$10,381,613	$139,407	$16,597,725

HAIL RATES.

Hail insurance on growing crops is in a formative state and the amount of business transacted is relatively small. It is written by comparatively few companies. The hazard is great and the experience from which to judge its future is limited.

The filing of hail rates hereto attached and marked 'A' is the schedule of rates at which such business has been written during the year 1929 except for proposed five-season hail policy, which has not heretofore been written in the State of Missouri.

[fol. 701] You are further notified that each and all of the changes mentioned will be effective February 1, 1930. Your approval is requested at such reasonable time before that date as will permit the practical application of such rates.

Yours very truly,

(Name of plaintiff attached)

Plaintiff's Exhibit 2.

April 25, 1930.

Hon. Joseph B. Thompson,
Superintendent of the Insurance Department,
of the State of Missouri.

Honorable Sir: --

Of date December 30, 1929, notice of change of rates was given you, whereby you were notified that the several insurance companies, and each and all of them, the names of which were thereto appended, had on that day made changes of their rates in writing on their public rating records, maintained in the office of Missouri Inspection Bureau, to which they were subscribers, and thereby gave you immediate notice of such changes, to which notice you are referred as to the changes so made and for the names of the several insurance companies thereto appended.

And by said notice you were further notified that each and all of the changes mentioned would be effective February 1, 1930, and your approval was requested at such reasonable time before that date as would permit the practical application of such rates.

[fol. 702] Now, you are hereby notified that said notification and filing are and remain, in all respects, in force, except as to the effective date of said changes, which effective date has been put forward from time to time at your request, and is now put forward to June 1, 1930, in place of February 1, 1930.

Yours very truly,

Name of plaintiff appended.

Plaintiff's Exhibit 3.

WRITTEN AND PAID BASIS YEAR 1929.

	Fire	Windstorm	Total All Classes
Written Premiums	$275,212	$ 56,763	$398,617
Paid Losses	$182,549	$ 10,635	$215,298
Paid Expenses	$139,053	$ 28,681	$201,409
Overplus or Deficiency	$-46,390	$+17,447	$-18,090

EARNED AND INCURRED BASIS YEAR 1929.

	Fire	Windstorm	Total All Classes
Earned Premiums	$319,363	$ 73,903	$446,984
Incurred Losses and Expenses	$342,195	$ 38,362	$440,156
Underwriting Loss	$-22,832	$+35,541	$+6,828"

[fol. 703] (Interlocutory Injunction Order.)

"In the United States District Court for the Central Division of the Western District of Missouri American Insurance Company, a corporation, Plaintiff, vs. Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri, and Stratton Shartel, Attorney General of the State of Missouri, Defendants. No. 270 In Equity

Now, on this second day of July, 1930, comes the plaintiff herein and having heretofore on May 29, 1930, filed its written motion and application for an interlocutory injunction, and having on May 31, 1930, and more than five days before the date of the hearing upon such application, served notice upon the Governor of the State of

Missouri and the Attorney General of the State of Missouri, as by law required, that the plaintiff will make application for this order to restrain the enforcement of certain sections of the Revised Statutes of the State of Missouri, as in said application for interlocutory injunction order and in said notice now on file is more specifically recited.

[fol. 704] And this matter now coming before a statutory court of three judges and having been duly argued by counsel for the plaintiff and for the defendants and the court having examined the verified bill of complaint and the evidence introduced on this hearing and being informed in the premises,

The court doth find that:

Immediate and irreparable injury, loss and damage will result to plaintiff unless an interlocutory injunction is granted in this: that if the plaintiff should, on and after June 1, 1930, write its insurance upon fire and windstorm risks at the pre-existing rate and not exact premiums at the 16 2/3% increased rate according to filing of December 30, 1929, effective June 1, 1930, the plaintiff would be debarred from any relief, and the premiums representing the difference between the rates of premium so collected at the lower rate and the rates of premium which plaintiff is entitled to receive according to such established and filed rate would be wholly lost to the plaintiff if plaintiff should finally prevail in this action.

And the court further finds that plaintiff has made such rate changes upon fire and windstorm rates upon its public record in writing and has given written notice thereof to the Superintendent of the Insurance Department of Missouri and fixed June 1, 1930, as the effective date thereof after fixing various intermediate effective dates and putting them forward at request of the Superintendent. Demand for approval was requested of the [fol. 705] Superintendent to be given a reasonable time before effective date, to enable plaintiff to make same in fact effective on the date specified, and he has, since the filing of the bill herein, made an order disapproving and denying said increase, and plaintiff has by amendment to its bill of complaint stated that the same is confiscatory and the court finds from said verified bill and said verified amendment to said bill that irreparable damage will

be suffered by the plaintiff from day to day if an interlocutory injunction shall not issue.

The court further finds that plaintiff has an established business of insurance, both fire insurance and windstorm insurance, in Missouri, entitled to the protection of the court, and that plaintiff is duly licensed and authorized to do business in the State of Missouri and that if not enjoined and restrained the defendant, the Superintendent of the Insurance Department of the State of Missouri, and the defendant, the Attorney General of the State of Missouri, will take action to cancel the license of the plaintiff and its agents and institute a multiplicity of suits to enforce penalties for its action in collecting and retaining such increase.

NOW, THEREFORE, it is by the court ordered that defendants, Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri, and Stratton Shartel, Attorney General of the State of Missouri, and each of them, and their deputies, attorneys, solicitors, agents, servants and representatives, and all other per-
[fol. 706] sons acting or claiming or assuming to act for or under the authority of said defendants, or either of them, and all other persons who now seek or attempt or who shall hereafter seek or attempt to interfere with or abridge the right of the plaintiff, or do any act in anywise militating against the right of the plaintiff, on and after June 1, 1930, to collect, demand, receive and retain premium charges upon fire insurance and premium charges upon windstorm insurance at the rates created and made by said filing of December 30, 1929, namely, an increase upon each of said classes of sixteen and two-thirds per cent above the level of rates obtaining prior to that time, be and they are hereby restrained and enjoined and the said defendants and the other persons aforesaid, acting, claiming or assuming to act for or under them, be, and they are hereby, restrained and enjoined from taking any proceedings whatever for fines, penalties, imprisonment, prosecution or revocation of license pursuant to or under the statutes of Missouri, or any powers claimed or asserted thereunder, and from advising, instituting, prosecuting or aiding in any action, suit or proceeding, or otherwise, to enforce the said statutes, or exercise or use the powers therein purported to be granted, or otherwise to act in derogation of the increase of rates initiated on December

30, 1929, and provided to be effective June 1, 1930; and be, and they are hereby, restrained and enjoined from so proceeding against the plaintiff or against any of its of- [fol. 707] ficers, agents or employes of the plaintiff, or against Missouri Inspection Bureau or its managers, which bureau is an agency of the plaintiff, or from giving or enforcing any orders or directions to said Missouri Inspection Bureau in anywise calculated to enforce or make effective any directions or powers of said statutes aforesaid or any powers asserted to exist by virtue of the laws of the State of Missouri affecting rates or premium charges of the plaintiff upon fire or windstorm insurance in derogation of the said filing and increase of rates aforementioned; and the said defendants and all others, as recited, acting under, for or through them, be and they are hereby restrained and enjoined from proceeding to recover from or to impose or enforce against the plaintiff or any of its officers, directors and United States managers, employees, attorneys in fact, agents, adjusters, inspectors, rating bureaus, inspection bureaus, or any other person in anywise representing the plaintiff, any fine, penalty, imprisonment, damages or demand for refusal or supposed refusal to obey, observe or comply with the statutes as respects any supposed duty of filing or securing of approval of the said increase, or from making any direction respecting application of said increase or from proceeding against the plaintiff, its agents or employees in anywise because of exaction on and after June 1, 1930, of premiums by the plaintiff at the said rate level resulting from the filing of December 30, 1929, to be effective June 1, 1930, or to proceed in anywise against [fol. 708] the plaintiff or any of its representatives aforesaid because of the delivery, negotiation for, or steps taken in the execution and delivery of policies specifying such rates, or in anywise to interfere with, advise, institute or prosecute or aid in any action, suit or proceeding, to interfere with, restrain or prevent the plaintiff or any of its officers, agents or employees from charging, receiving or collecting the rates of premium charged for insurance at the rates so established by the said rate increase and filing; and that the defendants be restrained and enjoined in anywise from proceeding to forfeit or from refusing to renew licenses of the plaintiff or any of its agents or representatives, or withholding such licenses upon the ground of any supposed violation by them, or

any of them because of said rate increase of December 30, 1929, effective June 1, 1930, and from making any revocation of authority or any proceeding or action for revocation of license of plaintiff or any of its agents, or from cancelling or withholding or refusing renewal because of plaintiff's action in bringing this suit in federal court; and defendants and each of them are enjoined and restrained from in anywise enforcing or taking any steps to enforce the order of disapproval or denial of increase made by the Superintendent of the Insurance Department of the State of Missouri on May 28, 1930, by any cancellation of license, suit, action, proceeding, prosecution for penalties or actions, criminal or civil, or from revoking or [fol. 709] undertaking to revoke the license of plaintiff or any of its agents, or taking any steps or action in anywise seeking to or designed to enforce or make effective defendants' order of disapproval or denial of increase. This interlocutory injunction shall be and remain effective and continue in force during the pendency of this suit and until the final hearing and decree of this court shall be made and entered.

PROVIDED, HOWEVER, that this injunction is dependent and conditioned upon the performance by this plaintiff as in this order hereafter set forth.

1. The plaintiff shall collect the premium exactions representing 16 2/3% increase, namely, the entire amount representing such increase of December 30, 1929, effective June 1, 1930 (whereby the level of rates upon fire insurance and windstorm insurance was increased 16 2/3 per cent), without deductions for commissions or any other expense in acquiring, receiving or retaining the same, and shall pay the same in the manner and form and at the times which the court may in this order or at any time direct and order, and shall execute bond with surety conditioned to pay all costs and damages which may accrue against any person by reason of the issuance of this injunction order, and in addition shall provide that the plaintiff shall pay the said moneys so impounded with the plaintiff as the court may in this order or at any time order or direct, and said bond shall be with surety to be approved by this court and shall be in the penal sum of [fol. 710] $10,000.00.

And now the plaintiff here in open court presents bond in form as so above provided with surety approved by this

court as above required, which said bond so presented and the surety thereon appearing and the terms and conditions of said bond are by the court now approved.

2. W. S. McLucas of Kansas City, Missouri, is appointed an officer of this court for the purposes of acting as custodian of the funds hereinafter described. He shall qualify by filing with the clerk of this court a bond (to be approved by any Judge of this Court) in the sum of One Hundred Thousand ($100,000.00) Dollars. Semi-annually, beginning with December 31, 1930, he shall file reports of his receipts, expenditures and disposition of funds on hand and shall make any other reports as required by this court. He shall pay out no money except upon the order of this court and all deposits (herein provided for) made by him shall be subject to this provision. He may employ necessary help, and the compensation of the custodian and such help and all other necessary expenses shall be paid by him and charged against the interest earned by such fund.

3. On or before the 15th day of September, 1930, this plaintiff shall report to the custodian, as an officer of this Court, the policy number, agency name and number and town or city of location of said agency, the name of the assured and the residence of the assured, the amount of the policy, the rate thereof, the term thereof, the kind of [fol. 711] risk or classification whether fire or tornado, the premium collected, the percentage of increase in such rate over the rate existing prior to June 1, 1930, and the number of dollars and cents representative of said increase, on all policies of insurance written by this plaintiff during the month of June, 1930, in the State of Missouri, covering fire (lightning) and/or windstorm risks or hazards, and shall pay over to said custodian, as an officer of this Court, the amount of money representative of said increase without deduction of any amount therefrom except return premiums paid to policy holders; and, on or before said September 15, 1930, shall report to said custodian, as an officer of this Court as aforesaid, all cancellations of policies written in the month of June, 1930, and up to that date made, giving the same information in respect to such policies so cancelled as given when the same were written and in addition thereto the amount of premium returned on account of such cancellation, and the amount of the increase of the premium, as aforesaid, as theretofore reported, which should be returned to

said policyholder. That, on or before December 15, 1930, like reports and payments shall be made covering the period from July 1, 1930, to and including September 30, 1930, and periodically thereafter (each three months), like reports and payments shall be made covering the period succeeding the next prior report, except that on each report cancellations and refunds paid occurring on [fol. 712] policies written at any time or on after June 1, 1930, and up to and including the date covered by each such report, and not theretofore reported, shall be reported.

All of such reports to be made by this plaintiff shall be made in triplicate, all copies thereof to be delivered to the custodian; one copy to be retained in his office, another copy to be filed in the office of the clerk of this Court and the third copy to be sent to the Superintendent of Insurance. Such reports shall be upon a standardized form to be approved by said custodian. Such custodian may demand and this plaintiff or the Superintendent of Insurance is required to furnish, by reports or otherwise as designated, any other information deemed necessary by such custodian to the proper performance of his duties as such.

4. As such deposits of money are received by the custodian, he shall deposit the same in banks (in this judicial district) to be designated by this Court and approved by the custodian, but no such deposit shall be made until said bank, as such depositary, shall file a surety company bond in form and amount to be approved by this Court, covering both the principal of said deposit and the interest to accrue thereon at the rate of two and one-quarter (2 1/4) per centum per annum for the time such money is so deposited.

The custodian or any party to this suit may call to the attention of the Court any action or lack of action by the [fol. 713] custodian or any party to this suit which will tend to defeat the purpose of this Court to collect and impound the increase of rates (16 2/3%) and/or to have such fund so impounded and available for payment to whomever may be finally determined to be entitled thereto.

It is further ordered that a copy of this order for interlocutory injunction, duly certified by the clerk, be served upon the defendants.

Kimbrough Stone,
Albert L. Reeves,
Merrill E. Otis,
Judges.

The clerk is directed to enter the above order of record and to enter an identical order in cases numbered 271 to 426, inclusive, in equity, in this Court, making the identical order in each of said cases, except that bond in like form and with the same surety may be approved in each of said cases by any judge of this Court.

Kimbrough Stone,
Albert L. Reeves,
Merrill E. Otis,
Judges.

Endorsed thereon:

Filed Jul. 2, 1930. Edwin R. Durham, Clerk. By Dudley W. Houtz. Deputy."

[fol. 714] (Orders Appointing Custodian and Successor Custodians.)

(The order appointing W. S. McLucas of Kansas City, Missouri, custodian of the impounded funds, is incorporated in the Interlocutory Injunction Order above set out.)

"In the United States District Court for the Central Division of the Western District of Missouri. American Insurance Company, a Corporation, Plaintiff, -VS- Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri, and Roy Mc. Kittrick, Attorney General of the State of Missouri, Defendants. In Equity No. 270 -also- Cases numbered 271 to 426 inclusive, In Equity.

(Order Accepting the [Ressignation] of W. S. Mc. Lucas as Custodian, and Appointing W. T. Kemper, Successor Custodian.)

Now on this day comes plaintiff by its attorney, E. R. Morrison, and come the defendants by their attorney, John

F. Rhodes, and there is presented to this Court the resignation of W. S. McLucas, Custodian heretofore appointed by the Court on the 2nd day of July, 1930, which resignation has heretofore been filed with the clerk of this [fol. 715] Court, to take effect as of the close of business on April 30th, 1933, and the Court having seen and examined said resignation, and being fully advised in the premises,

IT IS ORDERED:

1. That the resignation of the said W. S. McLucas as such Custodian is hereby accepted to take effect as of the close of the business day on April 30th, 1933.

2. W. T. Kemper, of Kansas City, Missouri, is hereby appointed Custodian to succeed the said W. S. Mc. Lucas, such appointment to take effect as the close of the business day April 30th, 1933, and immediately upon the resignation of the said W. S. McLucas as such Custodian becoming effective. The said W. T. Kemper shall qualify by filing with the clerk of this Court a bond (to be approved by any Judge of this Court) in the sum of ONE HUNDRED THOUSAND DOLLARS ($100,000.00). All of the provisions, terms and conditions of the said order of July 2nd, 1930, and of any and all other orders entered since the 2nd day of July, 1930, with reference to powers, duties and obligations of the said W. S. McLucas as such Custodian, shall apply to the said W. T. Kemper as Custodian from and after the date that this appointment becomes effective as to all sums and property which may come into the hands of said W. T. Kemper as said Custodian, with like force and effect as though he had been specifically named therein.

[fol. 716] 3. All orders heretofore entered with respect to the obligations and duties of the plaintiff herein with respect to accounting to, and paying funds to, the Custodian heretofore appointed by this Court, or in any way relating to the matter of funds deposited, or to be deposited, with the said Custodian pursuant to any and all orders heretofore entered by the Court in this cause, are continued in force, and shall apply with like force and effect to the said W. T. Kemper as such Custodian, provided that said Kemper shall be responsible thereunder only with respect to transactions from and after the effective date of his appointment and qualification.

4. As soon as practicable after the appointment of the said W. T. Kemper as such Custodian becomes effective, and after he shall have qualified by giving bond as aforesaid, the said W. S. McLucas as such Custodian shall TRANSFER, ASSIGN AND PAY OVER to the said W. T. Kemper as such Custodian, any and all moneys, bonds, securities, claims and choses in action then remaining in his hands or claimed by him as such Custodian, and shall execute all proper instruments and papers for that purpose.

5. From and after the effective date of the appointment of the said W. T. Kemper as such Custodian, and his qualification by giving bond as aforesaid, the Federal Reserve Bank of Kansas City, and any and all other banks and depositaries of moneys, bonds, securities or property belonging to or held by the said W. S. McLucas as such Custodian, shall forthwith, upon demand, TRANSFER AND [fol. 717] SET OVER the same to the said W. T. Kemper as Custodian, and said Federal Reserve Bank of Kansas City, and each and every such bank and depositary may take and accept orders, directions and receipts of W. T. Kemper as Custodian, with like effect as though such orders, directions and receipts had been made, executed and given by the said W. S. McLucas as Custodian, and shall be fully protected in so recognizing the validity thereof, and in acting thereon.

6. The order heretofore entered in this Cause on the 12th day of March, 1932, authorizing the deposit by W. S. McLucas, Custodian, of bonds, certificates and other securities of the United States government, with the Federal Reserve Bank at Kansas City, Missouri, and containing certain provisions with respect to such bonds, certificates and securities so deposited, is specifically continued in full force and effect as applied to the said W. T. Kemper as Custodian, and with like force and effect as though he had been specifically named therein. Likewise any and all other orders which have been entered in this Cause with respect to banks and depositaries are continued in full force and effect, and shall apply to, and be binding upon all parties to this Cause, and upon said W. T. Kemper as such Custodian, with respect to all transactions of the said W. T. Kemper from and after the effective date of his appointment and qualification. And said Federal Reserve Bank of Kansas City shall be,

and hereby is authorized and directed to turn over to [fol. 718] said W. T. Kemper as such Custodian, or to deliver as directed by him, the various United States Treasury Certificates of the aggregate par value of $305,000.00 mentioned in an order signed by one of the Judges of this Court, and entered herein on April 6th, 1933.

7. That as promptly as is reasonably practicable, the said W. S. McLucas shall cause an audit to be made of his accounts as such Custodian, to the close of business April 30th, 1933, by Scovell, Wellington & Company, certified public accountants, and submit same to this Court for its approval, together with his final report.

8. The Court retains jurisdiction herein for the purpose of making final orders in respect to the accountability and responsibility of W. S. McLucas as such Custodian, and the making to him of final allowance for his services as such.

DATED this 26 day of April, 1933.

Kimbrough Stone
Albert L. Reeves
Merrill E. Otis
Judges

The clerk is directed to enter the above order of record, and to enter an identical order in all of those cases numbered 271 to 426 inclusive, In Equity, which are still pending in this Court, making the identical order in each of said cases.

[fol. 719] DATED this 26 day of April, 1933.

Kimbrough Stone
Albert L. Reeves
Merrill E. Otis
Judges."

(Said ORDER was endorsed by the Clerk of the Court as follows:)

"FILED APR 26 1933 A. L. ARNOLD, Clerk, By E. O'Keefe Deputy"

(Order Appointing W. T. Kemper, Jr., Successor Custodian.)

"In the District Court of the United States for the Western District of Missouri, Central Division. American Insurance Company, a corporation, Plaintiff -VS- R. E. O'Malley (Successor in office to Joseph B. Thompson), Superintendent of the Insurance Department of the State of Missouri, and Roy Mc. Kittrick (Successor in office to Stratton Shartel), Attorney General of the State of Missouri, Defendants. In Equity No. 270

[fol. 720] On account of the lamented death of W. T. Kemper, appointed Custodian in the above entitled cause by an order of this Court entered on the 26th day of April, 1933, the Court caused due notices to be given to all parties to this cause that the Court would meet in the courtroom of Judge Albert L. Reeves in Kansas City, Missouri at the hour of 10 o'clock in the forenoon on January 22nd, 1938, for the purpose of acting concerning the appointment of a successor Custodian.

Pursuant to said notice the Court duly convened at the hour and place aforesaid, for the purpose aforesaid, and Honorable Homer H. Berger, attorney for the plaintiff and also for the Trustees mentioned in the Decree of February 1, 1936, appeared.

Whereupon after due consideration, the Court being fully advised in the premises, IT IS BY THE COURT ORDERED:

1. That W. T. Kemper, Jr., of Kansas City, Missouri, is hereby appointed as Custodian to succeed W. T. Kemper, deceased, in such capacity, such appointment to be effective at the hour of nine o'clock in the forenoon on January 24, 1938.

2. That said W. T. Kemper, Jr., shall qualify by filing with the clerk of this Court, a bond (to be approved by any Judge of this Court) in the sum of $100,000.00.

3. That all the provisions, terms and conditions contained in the order entered in this cause on July 2, 1930, appointing W. S. McLucas Custodian, and of any and all other orders, decrees, and modifications of orders and [fol. 721] decrees since that time entered in this cause, including, but not by way of limitation or restric-

tion, the decree entered herein on February 1, 1936 (sometime referred to as FINAL DECREE) with reference to the powers, duties, partial compensation, and obligations of the said W. S. McLucas as such Custodian and of the said W. T. Kemper as such Custodian, shall apply to the said W. T. Kemper, Jr. as Custodian from and after the date that his appointment becomes effective, with like force and effect as though he had been specifically named in said orders and decrees, respectively.

4. That all orders and decrees heretofore entered by the Court in this cause are continued in force and shall apply with like force and effect to said W. T. Kemper, Jr. as Custodian, provided that W. T. Kemper, Jr. shall be responsible thereunder only with respect to transactions from and after the effective date of his appointment.

5. That as soon as practicable after the appointment of said W. T. Kemper, Jr. as such Custodian becomes effective, and after he shall have qualified by giving bond as aforesaid, the said W. T. Kemper, Jr. shall, as such Custodian, take possession of any and all moneys, bonds, securities, claims and choses in action then remaining in the hands of said W. T. Kemper as such Custodian, or claimed by him as such Custodian.

6. That from and after the effective date of the ap- [fol. 722] pointment of said W. T. Kemper, Jr. as such Custodian, and his qualification by giving bond as aforesaid, the Federal Reserve Bank of Kansas City, and any and all other banks and depositories of moneys, bonds, securities or property belonging to or held by said W. T. Kemper as such Custodian, shall forthwith, upon demand, transfer and set over the same to the said W. T. Kemper, Jr. as Custodian, and the said Federal Reserve Bank of Kansas City and each and every other such bank and depository may take and accept orders, directions and receipts of W. T. Kemper, Jr. as Custodian with like effect as though such orders, directions and receipts had been made, executed and given by said W. T. Kemper as Custodian, and shall be fully protected in so recognizing the validity thereof and in acting thereon.

7. That the order heretofore entered in this cause on the 12th day of March, 1932, authorizing the deposit by W. S. McLucas, Custodian, of bonds, certificates and other securities of the United States Government, with the Fed-

eral Reserve Bank of Kansas City, Missouri, and containing certain provisions with reference to such bonds, certificates and securities so deposited, is specifically continued in full force and effect as applies to said W. T. Kemper, Jr. as such Custodian with like force and effect as though he had been specifically named therein. Likewise any and all other orders which have been entered in this cause with respect to banks and depositories are continued in [fol. 723] full force and effect, and shall apply to and be binding upon all parties to this cause and upon the said W. T. Kemper, Jr. as such Custodian, with respect to all transactions of the said W. T. Kemper, Jr. from and after the effective date of his appointment and qualification, and said Federal Reserve Bank of Kansas City shall be, and hereby is authorized and directed to turn over to said W. T. Kemper, Jr. as such Custodian, or to deliver as directed by him, the various securities of the aggregate par value of $755,000.00 heretofore deposited with said Federal Reserve Bank of Kansas City by the late W. T. Kemper as such Custodian.

8. That as promptly as is reasonably practicable, the said W. T. Kemper, Jr. shall cause an audit to be made of the accounts of the late W. T. Kemper as such Custodian, to the close of business on January 22, 1938, by Scovell, Wellington & Company, certified public accountants, and shall submit same to the Court for its approval, and at the same time there shall be submitted to the Court the final report of the late W. T. Kemper as such Custodian.

9. That the Court does hereby re-enter in this cause, a certain order entered by the Court herein on January 19, 1938, referring to certain checks heretofore signed by the late W. T. Kemper as such Custodian, and other matters, with like effect as if said order so dated January 19, 1938, had been set forth herein in full, provided, however, that after the time the appointment of said W. T. Kemper; [fol. 724] Jr. as such Custodian becomes effective, he shall have the supervision of all the checks mentioned in said order which have heretofore been signed by the late W. T. Kemper as such Custodian, and shall have authority to continue to handle the checks therein mentioned in the manner in said order set forth, and shall be responsible for the subsequent handling thereof, and all such checks forwarded to the assureds by him shall be treated and regarded in all respects with like effect as if they had

been signed by him, and the banks on which said checks have been drawn shall continue to have authority to pay same.

10. The Court retains jurisdiction herein for the purpose of making final orders in respect to the accountability and responsibility of the late W. T. Kemper as such Custodian, and the making to his estate of a final allowance for his services as such.

DATED this 22nd day of January, 1938.

Kimbrough Stone
Circuit Judge
Albert L. Reeves
District Judge
Merrill E. Otis
District Judge

The Clerk is directed to enter the identical order of record in each and every case listed on the appended list.

DATED this 22nd day of January, 1938.

[fol. 725]

Kimbrough Stone
Circuit Judge
Albert L. Reeves
District Judge
Merrill E. Otis
District Judge.

Court No.			
271	Agricultural Insurance Company	vs.	R. E. O'Malley, et al
273	Aetna Insurance Company	vs.	"
274	The Alliance Insurance Company	vs.	"
275	American Alliance Insurance Company	vs.	"
276	American Central Insurance Company	vs.	"
277	American Eagle Fire Insurance Company	vs.	"
279	American Union Insurance Company of New York	vs.	"
280	Atlas Assurance Company, Ltd.	vs.	"
281	Automobile Insurance Company of Hartford, Connecticut	vs.	"
282	Bankers and Shippers Insurance Company	vs.	"
283	Boston Insurance Company	vs.	"
284	British America Assurance Company	vs.	"
286	Caledonian Insurance Company	vs.	"
288	California Insurance Company	vs.	"
289	Camden Fire Insurance Association	vs.	"
292	Chicago Fire and Marine Insurance Company	vs.	"

293	Citizens Insurance Company	vs.	"
294	City of New York Insurance Company	vs.	"
295	Columbia Insurance Company (New Jersey)	vs.	"
296	Columbia Fire Insurance Company	vs.	"
297	Commerce Insurance Company	vs.	"
298	Commercial Union Assurance Company, Ltd.	vs.	"
299	Commercial Union Fire Ins. Co.	vs.	"
301	Concordia Fire Insurance Company of Milwaukee	vs.	"
302	Connecticut Fire Insurance Company	vs.	"
303	Continental Insurance Company	vs.	"
304	County Fire Insurance Company of Philadelphia	vs.	"
305	Detroit Fire and Marine Insurance Company	vs.	"

[fol. 726]

306	Dubuque Fire and Marine Insurance Company	vs.	R. E. O'Malley, et al
307	The Eagle Fire Company of New York	vs.	"
308	Eagle Star and British Dominions Insurance Company	vs.	"
309	East and West Insurance Company	vs.	"
310	Equitable Fire and Marine Insurance Company	vs.	"
312	Federal Union Insurance Company	vs.	"
313	Fidelity Phenix Fire Insurance Company	vs.	"
314	Fire Association of Philadelphia	vs.	"
315	Fireman's Fund Insurance Company	vs.	"
316	Fireman's Insurance Company	vs.	"
317	First American Fire Insurance Company	vs.	"
318	Franklin Fire Insurance Company of Philadelphia	vs.	"
319	Franklin National Insurance Company	vs.	"
320	Girard Fire and Marine Insurance Company	vs.	"
321	Glens Falls Insurance Company	vs.	"
322	Globe and Rutgers Fire Insurance Company	vs.	"
323	Granite State Fire Insurance Company	vs.	"
324	Great American Insurance Company	vs.	"
325	Guaranty Fire Insurance Company of Providence	vs.	"
326	The Hanover Fire Insurance Company	vs.	"
327	Hartford Fire Insurance Company	vs.	"
328	The Home Insurance Company	vs.	"
329	Home Fire and Marine Insurance Company	vs.	"
330	Hudson Insurance Company	vs.	"
331	Imperial Assurance Company	vs.	"

332	Importers and Exporters Insurance Company	vs.	"
334	Insurance Company of North America	vs.	"
335	Insurance Company of the State of Pennsylvania	vs.	"
336	The Law Union and Rock Insurance Company, Ltd.	vs.	"
338	Liverpool and London and Globe Insurance Company, Ltd.	vs.	"
339	The London Assurance Corporation	vs.	"
340	London and Lancashire Insurance Company, Ltd.	vs.	"

[fol. 727]

341	London and Provincial Marine and General Ins. Co., Ltd.	vs.	R. E. O'Malley, et al
342	London and Scottish Assurance Corporation, Ltd.	vs.	"
343	Lumbermen's Insurance Company	vs.	"
344	Manhattan Fire and Marine Insurance Company	vs.	"
345	Massachusetts Fire and Marine Insurance Company	vs.	"
346	Mechanics Insurance Company of Philadelphia	vs.	"
347	Merchants Insurance Company	vs.	"
348	Merchants Fire Assurance Corporation of New York	vs.	"
349	Merchants Fire Insurance Company	vs.	"
350	Mercury Insurance Company	vs.	"
351	Michigan Fire and Marine Insurance Company	vs.	"
352	Milwaukee Mechanics Insurance Company	vs.	"
354	National Ben Franklin Fire Insurance Company	vs.	"
355	National Fire Insurance Company of Hartford	vs.	"
356	National Liberty Insurance Company of America	vs.	"
357	National Reserve Insurance Company	vs.	"
358	National Security Fire Insurance Company	vs.	"
359	National Union Fire Insurance Company	vs.	"
361	The Newark Fire Insurance Company	vs.	"
362	New England Fire Insurance Company	vs.	"
363	New Hampshire Fire Insurance Company	vs.	"
364	New Jersey Insurance Company	vs.	"
366	New York Underwriters Insurance Company	vs.	"
367	Niagara Fire Insurance Company	vs.	"
369	The Northern Assurance Company, Ltd.	vs.	"
370	Northern Insurance Company	vs.	"

371	North River Insurance Company	vs.	"
372	Northwestern Fire and Marine Insurance Company	vs.	"
374	Norwich Union Fire Insurance Society, Ltd.	vs.	"
375	Old Colony Insurance Company	vs.	"
376	Orient Insurance Company	vs.	"
377	Pacific Fire Insurance Company	vs.	"
378	Palatine Insurance Company, Ltd.	vs.	"

[fol. 728]

379	Patriotic Insurance Company of America	vs.	R. E. O'Malley, et al
381	Philadelphia Fire and Marine Insurance Company	vs.	"
382	Phoenix Assurance Company, Ltd.	vs.	"
385	Presidential Fire and Marine Insurance Company	vs.	"
386	Providence Washington Insurance Company	vs.	"
387	Provident Fire Insurance Company	vs.	"
389	Queen Insurance Company of America	vs.	"
390	Reliance Insurance Company of Philadelphia	vs.	"
391	Rhode Island Insurance Company	vs.	"
392	Royal Exchange Assurance	vs.	"
393	Royal Insurance Company, Ltd.	vs.	"
394	Safeguard Insurance Company	vs.	"
395	St. Paul Fire and Marine Insurance Company	vs.	"
396	Scottish Union and National Insurance Company	vs.	"
397	Security Insurance Company of New Haven	vs.	"
398	Sentinel Fire Insurance Company	vs.	"
399	Springfield Fire and Marine Insurance Company	vs.	"
400	Standard Fire Insurance Company of Connecticut	vs.	"
401	Standard Fire Insurance Company of New Jersey	vs.	"
402	Star Insurance Company of America	vs.	"
403	The State Assurance Company, Ltd.	vs.	"
404	Stuyvesant Insurance Company	vs.	"
405	Sun Insurance Office, Ltd.	vs.	"
406	Superior Fire Insurance Company	vs.	"
407	Svea Fire and Life Insurance Company	vs.	"
408	Tokio Marine and Fire Insurance Company, Ltd.	vs.	"
409	Transcontinental Insurance Company	vs.	"
410	The Travelers Fire Insurance Company	vs.	"
411	Twin City Fire Insurance Company	vs.	"
412	Union Assurance Society, Ltd.	vs.	"

413	Union Fire Insurance Company	vs.	"
414	United Firemen's Insurance Company of Philadelphia	vs.	"
415	United States Fire Insurance Company	vs.	"
416	United States Merchants and Shippers Insurance Company	vs.	"
418	Victory Insurance Company	vs.	"

[fol. 729]

419	Westchester Fire Insurance Company	vs.	R. E. O'Malley, et al
420	Western Assurance Company	vs.	"
421	Western Fire Insurance Company	vs.	"
422	The World Fire and Marine Insurance Company	vs.	"
423	Yorkshire Insurance Company, Ltd.	vs.	"
425	Mechanics and Traders Insurance Company	vs.	"
426	Potomac Insurance Company of the District of Columbia	vs.	"
383	The Phoenix Insurance Company, et al	vs.	"

(Said ORDER was endorsed by the Clerk of the Court as follows:)

"FILED JAN 24 1938 A. L. ARNOLD, Clerk, By E. O'Keefe Deputy"

(The Answer of Defendants in Cause No. 270 has been lost, but the following is a typical Answer in the litigation in question:)

"In the District Court of the United States for the Central Division of the Western District of Missouri.

Insurance Company, a corporation, Plaintiff, vs. Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri, and Stratton Shartel, Attorney General of the State of Missouri, Defendants. No.

[fol. 730] (Answer of Defendants.)

Come now Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri, and Stratton Shartel, Attorney General of the State of Missouri, defendants in the above entitled cause, and for their answer to the bill in equity and the amendment to the bill in equity filed by the plaintiff in said cause state:

1. The defendants herein state that the interlocutory injunction heretofore and on July 2, 1930, issued by this Court should be set aside and for naught held in respect of one hundred fourteen (114) of the insurance companies of the total number of one hundred fifty-seven (157) who have filed individual bills in equity in this Court, a list of which companies is attached to and made a part of this answer and designated Exhibit I, and in respect of forty (40) of these companies who have filed individual bills in equity herein, a list of which forty (40) companies is attached to and made a part of this answer and marked Exhibit II, and in respect of all other of said companies, parties plaintiff in suits numbered 270 to 426, both inclusive, herein. These defendants state that it is impracticable, because of shortness of time and the necessity of printing the answers in each of said one hundred fifty-seven (157) cases, to have other than a uniform pleading composed and printed, and therefore these defendants ask leave of the Court to print in each of the cases this ground upon which dissolution of said interlocutory injunc-[fol. 731] tion is requested, and to have the same considered in respect to each of said plaintiffs in the one hundred fifty-seven (157) suits on the particular ground applicable, depending upon whether or not said plaintiff appears upon the one or the other of said lists attached to and made a part hereof and marked respectively Exhibits I and II, or upon neither of said lists. These defendants therefore state that the interlocutory injunction heretofore issued by this Court on July 2, 1930, should be set aside and for naught held, until said plaintiff makes restitution to policyholders under proper order of this Court of the 10% increase charge, collected and now in whole or in part held by said plaintiffs, from November 15, 1922, or from February 1, 1928, depending upon the list of said companies in which the particular plaintiff appears, or if it appears on neither of said lists then from the date it charged said 10% excess premium rates to the date that it ceased charging the same, and as grounds for such statement and request these defendants state:

First. That on the 9th day of October, 1922, the Insurance Department of the State of Missouri entered an order directing a 10% reduction in insurance rates against fire, lightning, hail and windstorm insurance companies doing business in Missouri, effective November 15, 1922;

that thereafter and before such reduction went into effect the same was suspended by all of the fire insurance companies doing business in Missouri, upon their filing a [fol. 731a] petition for review in the Circuit Court of Cole County; thereafter a referee was appointed and a complete and full hearing on the merits was held, and the referee found such reduction order in its application was improper and confiscatory; thereafter such finding of the referee was by the Circuit Court of Cole County sustained; thereafter on appeal to the Supreme Court of Missouri the reduction so made was in every way sustained, and the action of the Insurance Department upheld; thereafter, by certiorari, the case was taken to the Supreme Court of the United States and after being fully briefed, argued and presented that Court refused to interfere with the judgment and decision of the Supreme Court of Missouri and allowed such reduction order to remain in effect:

Aetna Insurance Company v. Ben C. Hyde, Superintendent of the Insurance Department of the State of Missouri, Vol. 315 Mo. Reports, page 113;

Aetna Insurance Company v. Ben C. Hyde, Superintendent of the Insurance Department of the State of Missouri, Vol. 275, U. S. 440, 48 Supreme Court Reporter 174.

Second. That a stipulation was entered into between certain of the plaintiffs appearing as plaintiffs in this group of cases numbered 270 to 426, inclusive, totaling some 114 in number and listed on Defendants' Exhibit I, and the Insurance Department of Missouri, whereby it was agreed that if such insurance companies be allowed, and they were, to collect the full rate instead of such [fol. 732] reduced rate they would not appeal to any court for an injunction preventing such rate order from going into effect, and would not assail the constitutionality of the Missouri Rating Act, and that pending such result such insurance companies would execute a bond or bonds sufficient in sum to return to all policyholders all excess premiums collected, if such reduction order was finally sustained by a court of last resort, and would restore to such policyholders such excess premiums so collected. That part of the stipulation is as follows:

"That after passing upon such findings of fact and the determination of the Superintendent of the Insurance

Department, an order reducing the rates charged by such stock companies on all fire, lightning, hail and windstorm insurance business written thereby in the State of Missouri be made by said Superintendent of the Insurance Department. Such order shall apply to all classes alike and the said insurance companies, if dissatisfied with said order, shall proceed to secure a review thereof by trial de novo in the Circuit Court of Cole County, Missouri.

That no injunction shall be applied for in said matter restraining the enforcement of said order, but pending such result and until the final determination of said cause in whatever court it may be finally lodged, the rates in force prior to the making of such order shall [fol. 733] be collected by such insurance companies, and such insurance companies shall give bond in addition and in such amount as the Court may direct to refund to the assured any excess of premiums collected by it, if such order of the Superintendent of the Insurance Department be finally sustained by decree or judgment of the court of last resort.

That in such matter the question of the constitutionality of Sections 6283 and 6284, Revised Statutes of Missouri 1919, shall not be raised, nor shall the legality of the hearing above provided for be questioned.

Bates, Hicks and Folonie,
Seymour Edgerton,
John S. Leahy,

Attorneys for the Plaintiffs,

Jesse W. Barrett,
Attorney General,
Merrill E. Otis,
Asst. Attorney General,

Attorneys for the Defendant.'

Third. That on February 14, 1928, subsequent to the decision of the Supreme Court of Missouri, as cited above in Vol. 315 thereof, and in the Supreme Court of the United States, as cited above in 48 Supreme Court Reporter 184, some 155 companies, they being the same companies which

are represented in the cases here numbered 270 to 426, both inclusive, filed their several actions in the United States District Court for the Western District of Missouri, Central Division, which cases were subsequently, by stipulation, transferred to the Western Division of the Western [fol. 734] District of Missouri, and therein heard, wherein said companies and each of them set up in substance identical matters and plead in substance all matters and things which said companies are pleading in their several identical bills in the present suits, numbered 270 to 426, both inclusive, concerning which an interlocutory injunction has been issued. A temporary restraining order was entered in each of said former cases on February 14, 1928. Thereafter the temporary restraining order was continued, the several bills were amended, and an application for temporary restraining order was entered on April 11, 1928. Thereafter a hearing was had before a three-judge court, constituted as provided by Section 266 of the Judicial Code, such court consisting of Stone, Circuit Judge, and Reeves and Kennamer, District Judges, on evidence consisting largely of affidavits on behalf of the plaintiffs and motion to dismiss and to dismiss or stay filed by the defendants. On the 13th day of April, 1929, an opinion was rendered therein and is reported in 34 Federal (2d), page 185, which opinion concluded that the application for temporary injunction as to some of said companies should be denied, and it was denied, and that the application for temporary injunction as to other of said companies should be granted, but only conditionally. On April 13, 1929, an order and decree denying said application for temporary injunction was entered, continuing the restraining order theretofore issued in effect until May 15, 1929, and pro- [fol. 735] viding further:

> 'III. The application for temporary injunction is denied and such injunction denied wthout prejudice to any plaintiff to renew such application, upon showing that it has repaid the excess of 10% collected on premiums on fire, lightning, hail and windstorm insurance on Missouri business since November 15, 1922, and up to the renewal of such application.

The opinion of said court in its conclusion recites (34 Fed. Reporter (2), l. c. 200):

'Allowance of the applications for temporary injunctions (upon conditions protective to premium payers) of all plaintiffs which were not parties to the stipulation.'

Said opinion further recites, l. c. 201:

'Denial of applications without prejudice of renewal upon a showing of repayment under the stipulation of all plaintiffs which were parties to the stipulation.'

In an addendum to said opinion, l. c. 201, the court obliges restitution by all companies, parties to said stipulation, of said 10% reduction on all such policies so written from November 15, 1922, up to the date of such renewal, if any, of application for temporary injunction, and on the part of all plaintiffs not parties to the stipulation from and after February 1, 1928, up to the date of the renewal, if any, of such application for temporary injunction.

[fol. 736] Fourth. In May, 1930, all of said plaintiffs dismissed such cases in this Court, and so far as we have been informed there has been no renewal of an application for a temporary injunction in any of those cases, prior to the filing of the cases herein, and numbered 270 to 426, both inclusive. The records in the office of the clerk of the United States District Court for the Western Division of the Western District of Missouri, to which such cases were transferred from the Central Division of the Western District of Missouri, do not disclose any showing made by any of those plaintiffs, who were likewise plaintiffs in this group of cases as heretofore stated, of a compliance with the order of April 13th and hereinafter quoted, in paragraph III thereof, obliging the said plaintiffs to make such showing of the return of the excess of 10% collected on premiums for fire, lightning, hail and windstorm insurance in Missouri on business since November 15, 1922, and February 1, 1928, respectively, prior to the institution of this and other actions now pending in this Court, and defendants state that none of said one hundred fourteen (114) companies aforesaid have made restitution of the excess of 10% collected on such premiums as aforesaid.

Said insurance companies, plaintiffs in such former suits, in which the opinion reported in 34 Federal (2d) 185 and following, was written, have, since the month of August, 1929, written insurance on fire, lightning, hail

and windstorm hazards in Missouri and have collected [fol. 737] premiums on account of such writings at a rate which took into account the 10% reduction ordered by the Superintendent of Insurance on October 9, 1922, and effective November 15, 1922, and such writings have been so made since August, 1929, up to and including May 31, 1930, following which date said companies have, as shown by their bills in the several cases herein, been writing insurance on such classes of risks in Missouri at an advance over said rate of 16 2/3%.

These defendants therefore state to the Court that these suits, numbered 270 to 426, both inclusive, and filed herein, and on account of which a temporary injunction has been issued, represent in truth and in fact an attempt on the part of said companies who were parties to said stipulation, which companies are shown on Exhibit I attached hereto, and on Exhibit II attached hereto, to gain an advantage in rates of premium on writings on Missouri business on such classes of risks, which advantage in the matter of premium rates was by a statutory three-judge court sitting in the Western Division of the Western District of Missouri, at Kansas City, denied to them, as shown by the opinion reported in 34 Federal (2d) 185, et seq.; that the plaintiffs herein who were parties to said stipulation as aforesaid have sought to avoid the conditions imposed upon them in the old Federal Court suits heretofore mentioned, by dismissing the same, as heretofore stated, and instituting these new suits, but in fact such prodecure [fol. 738] discloses no difference except in form, the substance thereof being the same.

Wherefore, these defendants pray as follows:

a. That in respect to those companies who are parties plaintiff, to the extent that they are, in cases numbered 270 to 426, both inclusive, and who are parties to the stipulation herein above set out and on account of which an order was entered on April 13, 1929, as hereinabove quoted, the interlocutory injunction order heretofore issued in such of these cases be set aside and for naught held, and the application of said companies for injunctive relief be by this Court denied, until said companies shall, by proper accounting to this Court, make showing that they have in fact either restored to the policyholders all moneys collected by them from November 15, 1922, until August, 1929, and representative of 10% of the amount

of said premiums so collected, or have delivered over such funds under order of this or some other Court of competent jurisdiction to such person or persons specified by such Court, for distribution to said policyholders or otherwise, as said Court may direct, and to the extent, if any, that such moneys cannot be returned to said policyholders, for any reason whatsoever, they shall be directed to be accounted for and disposed of as this Court shall hereafter direct.

b. That in respect to those companies parties plaintiff in any of these suits numbered 270 to 426, both inclusive, who were also parties plaintiff in the former Federal [fol. 739] Court suits hereinabove referred to, but were not parties to the stipulation hereinabove referred to, that said interlocutory injunction heretofore issued on July 2, 1930, be set aside and for naught held, and the application of each of said plaintiffs for any injunctive relief be denied, until said companies shall, by proper accounting to this Court, make showing that they have in fact either restored to the policyholders all moneys collected by them from February 1, 1928, until August, 1929, and representative of 10% of the amount of said premiums so collected, or have delivered over such sums under order of such Court to such person or persons specified by such Court, for distribution to said policyholders or otherwise, as said Court may direct, and to the extent, if any, that such moneys cannot be returned to said policyholders, for any reason whatsoever, they shall be directed to be accounted for and disposed of as such Court shall hereafter direct.

c. That in respect to those companies plaintiffs in any of these suits numbered 270 to 426, both inclusive, who were not parties plaintiff in any of the former Federal Court suits hereinabove referred to, nor parties to the stipulation hereinabove referred to, that said interlocutory injunction order heretofore issued on July 2, 1930, be set aside and for naught held, and the application for any injunctive relief herein be denied, until said companies shall, by proper accounting to this Court, make showing that [fol. 740] they have in fact either restored to the policyholders all moneys collected by them from February 1, 1928, until August, 1929, and representative of 10% of the amount of said premiums so collected, or have delivered over such sums under order of such Court to such person or persons specified by this Court, for distribution to said

policyholders or otherwise, as said Court may direct, and to the extent, if any, that such money cannot be returned to said policyholders, for any reason whatsoever, they shall be directed to be accounted for and disposed of as this Court shall hereafter direct.

2. For further answer to the bill in equity filed herein, these defendants state that this action by this plaintiff was prematurely brought, in this:

(a) That on December 30, 1929, this plaintiff had given notice to the defendant the Superintendent of Insurance of the State of Missouri, that it would on February 1, 1930, put into effect at 16 2/3% increase in rates of premium charged on fire, lightning and windstorm insurance in the State of Missouri; that thereafter said effective date was successively continued on the request of the defendant the Superintendent of Insurance until June 1, 1930; that prior to June 1, 1930, the defendant the Superintendent of Insurance of the State of Missouri did request of this plaintiff that it make further extension of said effective date; that all such requests made by the defendant the Superintendent of Insurance were made for the reason and on the [fol. 741] ground that the Superintendent of Insurance had not had sufficient time to examine into the application for such increase, to determine if the same should be granted; that the defendant the Superintendent of Insurance was proceeding and had been proceeding in good faith and with the utmost of speed and dispatch since December 30, 1929, to examine into the application of this plaintiff for an increase in rates in the aforesaid classes; that on May 28, 1930, at 8:30 o'clock a.m., the defendant the Superintendent of Insurance of the State of Missouri was served with notice of the filing by this plaintiff in the United States District Court for the Western District of Missouri, Central Division thereof at Jefferson City, Missouri, of its bill in equity, asking for a restraining order against these defendants in anywise interfering with the putting into effect of said 16 2/3% increase of premium rates on such classes of insurance by this plaintiff on and after June 1, 1930; that no notice of any kind had been given to the defendant Superintendent of Insurance of the State of Missouri by this plaintiff of its intention to file its bill in equity as aforesaid, and no notice had been given to this defendant Superintendent of Insurance of the State of Missouri by this plaintiff that it would not, as the

defendant the Superintendent of Insurance of the State of Missouri had theretofore requested, give further extension of time on the effective date of said increase of 16 2/3% in said rates; that this defendant the Superintendent of Insurance of the State of Missouri had made no finding [fol. 742] or order of any kind or nature prior to the filing of the bill in equity by this plaintiff in respect to said application for such increase, but said defendant Superintendent of Insurance, as was well known to this plaintiff, had been proceeding with the utmost of speed and dispatch and the utmost of good faith to determine the facts in respect to the experience of this plaintiff in its insurance business in the State of Missouri for the period of time from 1924 to 1928, inclusive, on the classes of insurance in respect of which an application for increase had been filed, and was on May 28, 1930, so proceeding; that neither of these defendants had on May 28, 1930, nor have they since that time made any threat of any kind against this plaintiff, nor have they sought to interfere with in anywise a proper conduct of the insurance business of this plaintiff in the State of Missouri.

(b) That the filing by this plaintiff of its bill in equity herein, in view of the allegations therein contained, was and is a premature filing, and further it cannot support any prayer for injunctive relief in view of the fact that at the time of said filing no finding of any kind had been made by the Superintendent of Insurance of the State of Missouri in respect of the application of the plaintiff herein as aforesaid for an increase in rates in the amount and on the classes aforesaid, and in view of the further fact that there has not been any finding of any kind in respect to the experience of this plaintiff on its insurance business in the State of Missouri for the period of time covered in [fol. 743] said application for such increase. That the subsequent finding of the Superintendent of Insurance of the State of Missouri at 10:30 o'clock p.m. on May 28, 1930, of the experience of all of the stock fire insurance companies doing business in Missouri in the aggregate for the period 1924 to 1928, inclusive, does not in anywise in itself cover the grounds of the application for such increase or the experience of this plaintiff on such business in the State of Missouri for such period, and if such finding may be said to cover such experience, such finding cannot relate back to the time of the filing of the bill in equity herein so as to support injunctive relief in respect thereof.

Wherefore, these defendants pray that the interlocutory injunction heretofore issued on July 2, 1930, on the basis of the bill in equity filed herein by this plaintiff and the amendment to said bill filed herein by this plaintiff subsequent to the filing of said bill and subsequent to June 1, 1930, be dissolved and for naught held.

3. Defendants further allege and state that the interlocutory injunction heretofore entered on July 2, 1930, by this Court should be set aside and for naught held, and the plaintiff herein should be denied all injunctive relief, for the reason and on the ground that the plaintiff is asserting in its bill and amendment on the one hand that Sections 6274 and 6283, Revised Statutes of Missouri 1919, as amended, are in their terms unconstitutional, in that [fol. 744] they violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and on the other hand the plaintiff is seeking to gain the benefits thereof in that it is asserting in its bill and amendment thereto that it is entitled to have an increase of 16 2/3%. in rates of premium on the classes of insurance referred to, because it has followed the procedure provided therefor, as it alleges, in said acts, and the defendant Superintendent of Insurance of Missouri may not approve or disapprove said increase because of lack of authority therein provided to do so, but if he may be said to have such authority then because of his alleged delay in acting on the application of the plaintiff for such increase he has permitted such increase to become effective. This plaintiff cannot, so as to have injunctive relief against the defendants, at the same time assert the acts unconstitutional either under the Federal or State Constitutions and claim benefits under the provisions thereof.

4. For their further answer to the bill in equity filed herein by this plaintiff and to the amendment thereto filed herein, these defendants state:

FIRST

Defendants admit that at all times mentioned in the bill in equity plaintiff was a corporation of a state other than the State of Missouri, and was organized and existing under the laws of the State (or country) of
as a stock fire insurance company, and that it was at all [fol. 745] times mentioned in said bill in equity and now is authorized by its charter to do a business of fire (light-

ning), windstorm, hail and allied lines of insurance usually done by fire insurance companies, and that the plaintiff is a resident of the state last above named, but these defendants deny that the plaintiff is a citizen of such state.

Defendants admit that the defendant Joseph B. Thompson is now and at all times in said bill in equity mentioned was a citizen of the State of Missouri, residing in the Central Division of the Western District of Missouri, and that he is now and was at all times therein mentioned the duly appointed, qualified and acting Superintendent of the Insurance Department of the State of Missouri.

Defendants admit that the defendant Stratton Shartel is Attorney General of the State of Missouri, and as such Attorney General is the chief law enforcing officer of said state, subject in certain particulars to the control and direction of the Governor of the state, and has supervision of the enforcement of the laws on behalf of the state against any person or corporation who may be claimed to have violated the law, but subject to certain qualifications and limitations generally to enforce the law on behalf of said commonwealth. Said Stratton Shartel is a citizen of the State of Missouri and a resident of the Central Division of the Western District of Missouri.

[fol. 746] SECOND

Defendants deny that this is a suit of a civil nature in equity and deny that the matter in controversy is of the value of $5,000 or exceeds exclusive of interest and costs, the sum or value of $3,000.

(1) Defendants deny that this suit arises under the Constitution of the United States because the powers asserted and claimed by the defendant Superintendent of the Insurance Department of the State of Missouri and the acts done by him and failure of action whereof he is allegedly guilty, as applied against the plaintiff, are violative of the first section of the Fourteenth Amendment to the Constitution of the United States, in that the same either deny to the plaintiff the equal protection of the law or deprive the plaintiff of its property and liberty without due process of law.

(2) Defendants deny that said suit arises under the Constitution of the United States in that Section 6274 and

Section 6287 and Section 6311, Revised Statutes of Missouri 1919, and Section 6283 of the Revised Statutes of Missouri 1919, as amended (1927 Annotated Supplement to Missouri Revised Statutes 1919 -- Laws of Missouri 1923, S. B. 329) are void and violative of the first section of the Fourteenth Amendment to the Constitution of the United States for the reason, as alleged, that they and each of them deny to the plaintiff the equal protection of the law and deprive plaintiff of its property and liberty [fol. 747] of contract without due process of law, and further deny that said suit arises under the Constitution of the United States in that, as alleged, Section 6311, Revised Statutes of Missouri 1919, is in contravention of Section 2, Article 3 of the Constitution of the United States.

Defendants deny that said statutes or any one of them, alone or in connection with other statutes, as same are construed and applied, deprive the plaintiff of its property without due process of law or deny to the plaintiff equal protection of the laws.

(3) Defendants deny that this suit is between citizens of different states, but admit that it is between the plaintiff, a corporation of the State (or country) of _____, and the defendants, who are citizens of the State of Missouri, and defendants further deny that the plaintiff is a citizen of the State (or country) under the laws of which it is organized as a corporation as aforesaid.

THIRD

(1) Defendants admit that the plaintiff is and at all times mentioned in said bill in equity was a stock fire insurance company engaged in the business of fire (lightning), windstorm and hail insurance, and doing in addition allied lines of insurance authorized by its charter, and was at all times and now is authorized and licensed to do and is doing said business in the State of Missouri by license issued (and annually renewed) from the con- [fol. 748] stituted authorities of said state, namely from the Superintendent of the Insurance Department of the State of Missouri.

Defendants admit that in order to conduct its business in the State of Missouri plaintiff has been obliged to establish and did establish, long before the first day of June, 1930, upon its entry upon the doing of business in the

State of Missouri, local agencies in various cities and towns throughout the state, but said defendants deny that such establishment was at large cost and expense and deny that said agencies so established are of great value. Defendants admit that without such agencies it would be impossible for the plaintiff to conduct its business of insurance in the State of Missouri and deny that said agencies of the plaintiff are of great value to the plaintiff, and deny that they are of the value of $5,000.

Defendants deny that the plaintiff has made surveys and has, from such surveys, compiled maps or caused the same to be compiled which are either in whole or in part furnished or supplied to the agents of the plaintiff by it, and further deny that either in whole or in part copies thereof are maintained in plaintiff's supervisory office, and further deny that any such surveys and/or maps are used or employed by it in the State of Missouri in the writing of insurance therein or in locating and ascertaining the nature, character and detail of risks subject to insurance. Defendants admit that it is desirable and in part necessary that the writing of insurance in the State [fol. 749] of Missouri by the plaintiff is on the basis of surveys and maps compiled from such surveys, but deny that it, the plaintiff, either has made or caused to be made any surveys or maps, or that it has furnished or caused to be furnished to its agents in the State of Missouri any surveys and/or maps. Defendants further deny that such maps and surveys as are used in the writing of insurance are of a reasonable value in excess of the sum of $1000.

Defendants deny that the plaintiff has compiled or that it now maintains in the State of Missouri a public rating record through the medium of the Missouri Inspection Bureau, including extensive maps, surveys and other data comprehending the result of inspection of many thousands of parcels of insurable property risks in said state, from which data and compilations the rates of premium applicable to such insurance risks in this state may be ascertained upon the making of or application for insurance thereon; defendants further deny that such rating record includes general basis schedules and embodies basis rates, charges, terms, conditions, permits and standards and other data, and deny that the data contained thereupon are such as are necessary for the computation and promulgation of equitable rates and rules of practice by

the plaintiff. Defendants deny that such general basis schedules, rates, charges, terms, conditions, permits and standards as have been compiled and are now maintained [fol. 750] in the State of Missouri are in accordance with the requirements of Section 6270, Revised Statutes of Missouri 1919, or any other statute of the State of Missouri, and deny that such as are maintained are sufficient for the proper computation and promulgation of equitable rates and rules of practice. Defendants further deny that such records show the forms and endorsements upon which each rate is predicated and show the changes of rate to be made on account of the employment or omission from the insurance of said forms or endorsements. Defendants further deny that such rating records as are maintained are of the value of more than $3,000.

(2) Defendants admit that in December, 1929, and during all of the time from January 1, 1924, to the present time, and long prior to December, 1929, and at the time of the making and filing of the increase on the part of the plaintiff later specifically mentioned in said bill in equity, there were and now are in force certain public laws of the State of Missouri known as Article 8, Sections 6270 to 6388, both inclusive, Revised Statutes of Missouri 1919, as the same have from time to time been amended and/or repealed and superseded, and defendants further admit that said laws in part are set out in sub-paragraph (2) of Section Third on pages 4, 5 and 6 of plaintiff's bill in equity, but defendants deny that this plaintiff has during the time it has been doing a business of fire (lightning), windstorm and hail and other allied lines of insurance in the State of Missouri, kept and maintained [fol. 751] rating records in the State of Missouri in the offices of the Missouri Inspection Bureau or of its separate offices and agencies in compliance with Section 6270, Revised Statutes of Missouri 1919, and defendants further deny that said plaintiff has during all of such times complied with said laws.

(3) Defendants admit that on December 30, 1929, plaintiff was an insurance company commonly known as a fire insurance company, authorized by its charter to effect insurance against the risk of loss by fire (lightning), hail and windstorm, but deny that said plaintiff did maintain a public rating record in the State of Missouri from which the rate of premium applicable for each risk in the State of Missouri to be made by said plaintiff might be

ascertained in advance in the making of insurance thereon, which rating record was full and complete and in compliance with the provisions of Section 6270, Statutes of Missouri 1919, and deny that any such rating record was by said plaintiff publicly maintained in the office of Missouri Inspection Bureau, an acturial bureau located in St. Louis, Missouri.

Defendants admit that the plaintiff is duly licensed and authorized to do such business in the State of Missouri, and admit that it did in all things comply with the provisions of the statutes of Missouri permitting it to become licensed and authorized to do the business of fire and windstorm and allied lines of insurance in said state. [fol. 752] Defendants deny that prior to December 30, 1929, there existed and had been created and existing a level of rates of premium charged upon fire insurance and a level of rates of premium charged upon windstorm insurance uniformly through said State of Missouri for a long time, or for more than six years prior to that time, or for any length of time, and further deny that this plaintiff adhered to or conformed to any such level of rates of premium, and deny that stock fire insurance companies generally doing business in said state conformed and adhered to any such alleged level of rates of premium charges, and further deny that such level of rates was applied upon mercantile, manufacturing and special hazard risks by relative measurement and determination of hazard inhering in various risks, or that the same was applied upon rules, standards, analysis and fixation of rates and charges and credits applied thereto.

Defendants deny that upon risks or liability subject to analysis a common rate base was applied, more or less flat in its nature but variant in the ultimate premium charge, by the application of common factors relating to structure, protection and to the elements of defense in risk designed to make charges vary only because of differences in hazards, and deny that such rates either were applied with practical uniformity throughout the state or were adhered to and employed by the plaintiff or generally by stock fire insurance companies doing business in the State of Missouri. The rates charged by this plaintiff for the assump- [fol. 753] tion of fire (lightning) and windstorm insurance risks was administered by the plaintiff largely through the medium of the Missouri Inspection Bureau,

but defendants deny that said Missouri Inspection Bureau determined relatively equitable rates, although defendants admit that such rates as were in that wise determined were determined according to rules of measurement generally known as analytic system for measurement of relative fire hazards and divers schedules by it created and administered and applied, and by inspection and examination of risks and hazards inhering in the various properties in the state. Defendants deny, however, that the creation of such relation of risks, one to the other, as was made and is being made by the Missouri Inspection Bureau was subject to scientific determination, inspection and application of engineering and fire prevention knowledge and experience. Defendants admit that the plaintiff and other stock fire insurance companies doing business in Missouri generally subscribe to and are members of Missouri Inspection Bureau.

Defendants admit that upon December 30, 1929, the plaintiff gave notice to the Superintendent of Insurance of the State of Missouri that it would on that day and that it had made changes in its rates in writing on its public rating records maintained in the office of the Missouri Inspection Bureau, to which it was a subscriber, and that notice so given is, except for the signature thereto appearing, properly exemplified in plaintiff's Exhibit 1 attached [fol. 754] to its bill in equity, but defendants deny that said plaintiff had any right or has now any right or authority in law to make such change, except under and by virtue of the provisions of the laws of the State of Missouri, and defendants deny that said plaintiff complied therewith in giving such notice or in making or attempting to make such change in rates.

Defendants deny that by any change attempted by the plaintiff to be made in its public record or by the giving of such notice that said plaintiff would have a right or a warrant of authority and law to increase its rates on fire and lightning insurance 16 2/3% or any other increase above the rates theretofore existing, or that such change so attempted to be made by said plaintiff is in fact a change which in law does or would entitle said plaintiff to charge any increased rate.

Defendants admit that the plaintiff has not for a long period of time nor does it not make insurance against the hazard of lightning by separate policies of insurance, but

such insurance is uniformly made as an incident to and by the same policy whereby fire insurance is made, but defendants deny that no separate charge or added charge is made because of carrying the hazards of lightning.

Defendants admit that on December 30, 1929, the plaintiff did in the same manner and form and through the same means make a like attempt to increase the premium charged for insurance against the hazard of windstorm [fol. 755] by 16 2/3%, but defendants deny that such attempts so made in respect to windstorm insurance rates were in any wise effectual to make such change, or sufficient in law to permit said plaintiff to charge any increased rate.

Defendants admit that the plaintiff notified said Superintendent of Insurance of the State of Missouri as shown by plaintiff's Exhibit 1 attached to its bills, that all such changes so attempted to be made would be effective February 1, 1930, but deny that said plaintiff accomplished an increase by virtue of said notice, but admit that the approval of the Superintendent of Insurance was requested

> 'at such reasonable time before the said effective date specified as would permit the practical application of such rates.'

Defendants further admit that the said Superintendent of Insurance of the State of Missouri has from time to time requested of the plaintiff that the effective date as given in said notice hereinabove referred to be set forward, and that the plaintiff has complied with said requests for such extension to March 1, 1930, April 1, 1930, May 1, 1930, and June 1, 1930, and said defendants assert that the defendant the Superintendent of Insurance of the State of Missouri then requested a further extension of said alleged effective date from June 1, 1930, but that this plaintiff, without advising the defendant the Superintendent of Insurance that it would not make fur- [fol. 756] ther extension of said alleged effective date, did, without any notice to the defendant Superintendent of Insurance, advise all of its agencies in the State of Missouri that said proposed and alleged increase of 16 2/3% in rate in fire (lightning) and windstorm insurance would be by said plaintiff put into effect on June 1, 1930, and that this plaintiff did not give this defendant Superintend-

ent of Insurance any notice of any kind of such notices having been given to its agencies in the State of Missouri or of its intention to on and after June 1, 1930, charge an increase in rate of 16 2/3% in insurance effective against the hazards of fire (lightning) and windstorm. Defendants admit that the Superintendent of Insurance requested such extensions of said alleged effective date on the ground that he had not had opportunity reasonably to acquaint himself of the facts in respect to earnings made by this plaintiff on insurance risks written by its agencies in the State of Missouri and/or earnings made by this plaintiff from other sources in its insurance business, and defendant Superintendent of Insurance further states that said plaintiff well knew and now knows that a reasonable time within which to make necessary examination by the Insurance Department of the State of Missouri in respect to whether or not an increase in rates on fire (lightning) and windstorm insurance risks in the State of Missouri, would be and is considerably longer than the time subsequent to December 30, 1929, and prior to June 1, [fol. 757] 1930, and would in fact be several months in time in addition thereto; that this plaintiff well knew that there are in excess of two hundred stock fire insurance companies doing business in the State of Missouri, and that each and all thereof gave such like notices of their intention to charge an increase of 16 2/3% in premium rates on such insurance risks in the State of Missouri, and that such notices were given at the same time as the notice given by this plaintiff, and through a common agency, to-wit: Missouri Inspection Bureau, and further that it was necessary that the defendant Superintendent of Insurance of the State of Missouri examine into the rates of premium charged on such classes of risks by all such companies; and that he could not single out one company over another and dispose of that in respect to change of such rates, if any, prior to the disposition of any other of such companies, and the defendants assert that said plaintiff did, by virtue of such notice as aforesaid and the failure finally to agree to an extension of such alleged effective date to permit this defendant the Superintendent of Insurance adequate time to examine into the facts in respect to whether any increase would or would not be warranted, and therefore could or could not be approved, and by virtue of this plaintiff's knowledge of such like notice being given to this defendant Superintendent of Insurance by each of the other more than two hun-

dred stock fire insurance companies doing business in the State of Missouri, all such notices being given on the [fol. 758] same date and for the same alleged effective date and through the same medium, to-wit, the Missouri Inspection Bureau, in St. Louis, Missouri, to which this plaintiff and all other stock fire insurance companies are subscribers, enter into a conspiracy with each of the other of said companies designed to prevent this defendant the Superintendent of Insurance of the State of Missouri adequately performing the functions of his office in respect to examination prior to any change in rates of fire (lightning) and/or windstorm insurance risks in the State of Missouri, and for the purpose and design of collecting from the policyholders of the State of Missouri an increase of one-sixth in premium rate on such classes of risks over the premium rate theretofore existing, to its own excess profit and benefit and to the irreparable injury and damage of the individual policyholders or those in future becoming policyholders of the plaintiff, and to the irreparable injury and damage of the defendant the Superintendent of Insurance of the State of Missouri in the orderly operation and administration of his office, and likewise the irreparable injury and damage of the defendant the Attorney General of Missouri in the operation and administration of his office in respect to an orderly application and enforcement of the laws of the State of Missouri relating to stock fire insurance companies doing business in such state.

(4) Defendants deny that the defendant Superintendent of Insurance of the State of Missouri knew that this plaintiff suffered any loss from day to day because of [fol. 759] writing insurance on risks of fire (lightning) and/or windstorm at the premium rates existing thereon prior to the increase of 16 2/3% attempted to be put into effect by this plaintiff on and after June 1, 1930, and the defendants deny that said plaintiff has at any time or that it would now suffer any loss by virtue of writing insurance risks at premium rates existing prior to the first day of June, 1930; defendants further deny that the defendant Superintendent of Insurance in any wise failed or neglected to act upon and/or approve or disapprove the proposed change in rates, notice of which was given by this plaintiff to the defendant on December 30, 1929, as shown by plaintiff's Exhibit 1, and defendants deny

that the defendant Superintendent of Insurance in any wise failed to take any action thereon, but on the contrary assert that the defendant Superintendent of Insurance promptly upon receiving said notice proceeded to examine into the facts in respect thereof and continued such examination and was so continuing on June 1, 1930, and is now continuing to examine into the facts in respect thereof, and that he is proceeding with all possible speed and dispatch to ascertain said facts and to arrive at a conclusion thereon in respect to such proposed increase as shown on plaintiff's Exhibit 1 attached to its bill in equity herein. Defendants admit that the defendant Superintendent of Insurance had made no approval or disapproval of said proposed increases prior to the time of the filing by this plaintiff of its bill in equity herein, and these defendants [fol. 760] admit that the defendant Superintendent of Insurance insisted and asserted and now insists and asserts that this plaintiff is bound to continue to write insurance on said classes of insurance at rates existing prior to December 30, 1929, without including in said premium charges of the plaintiff said respective increases aforesaid, but said defendants assert, as hereinabove set forth, that the defendant Superintendent of Insurance was at all times and is now and is continuing to with all possible speed and dispatch examine into the facts in respect to premium rates on such classes of insurance to determine if any increase in such rates, and if so to what extent such increase, if any, should be approved by the defendant Superintendent of Insurance of the State of Missouri, and these defendants admit the assertion by them and each of them of the lack of power on the part of the plaintiff to collect, enforce and receive any increase in said premium rates without the consent and approval of the Superintendent of Insurance being first had and obtained.

(5) Defendants admit that the plaintiff did, together with its notification of increase as shown by plaintiff's Exhibit 1 attached to its bill of complaint, deliver to the Superintendent of Insurance of the State of Missouri an alleged statement of the plaintiff's experience year by year for five calendar years prior to December 30, 1929, for the State of Missouri, showing an alleged experience of the plaintiff of income and outgo upon its business of [fol. 761] insurance upon the hazard of fire and upon the hazard of windstorm, as well as upon other classes

for said years 1924 to 1928, both inclusive, but these defendants deny that such alleged experience as so set up delivered to the defendant Superintendent of Insurance is in fact the experience of this plaintiff, and these defendants and each of them deny that the figures therein contained as constituting the experience of income and outgo of this plaintiff for such period of time are in fact a correct reflection of said income and outgo, and the defendants further deny that said figures so delivered to the Superintendent of Insurance as aforesaid represent all of the items of income and outgo that must be taken into account to determine the actual and true experience of this plaintiff in respect to such classes of insurance, and these defendants assert that such figures so exhibited as aforesaid and delivered to the defendant Superintendent of Insurance are wholly inaccurate and worthless for use in determining the true experience of this plaintiff on its insurance business in Missouri on the classes of fire (lightning) and windstorm risks for the years 1924 to 1928, both inclusive.

Defendants admit that a statement and tabulation of income and outgo of other fire insurance companies doing business in the State of Missouri was at the same time delivered to the Superintendent of Insurance, and that he has had before him and in his possession since December 30, 1929, such alleged experience of each and all [fol. 762] stock fire insurance companies doing business in Missouri, showing the income and outgo of their business of insurance, not only on the certain classes as respects which an increase was applied for, but upon all other classes of insurance written by them, and in addition said Superintendent of Insurance has reports of experience by years of the plaintiff and all other stock fire insurance companies doing business in the state, which have been made to him annually on blanks prescribed by said defendant Superintendent of Insurance, but in respect to each and all of these, these defendants state and assert that the figures thereon for the purpose of determining whether or not this plaintiff should have an increase in rates of premium on fire (lightning) and/or windstorm insurance risks in the State of Missouri, are wholly worthless in that they have not been verified and that they are in fact wholly inaccurate and do not comprehend all of the items of income and outgo and experience in other respects which are necessary to take

into account to determine the true experience of this plaintiff in the State of Missouri on such classes of risks as aforesaid for the years as aforesaid, in order to arrive at a conclusion as to whether or not this plaintiff should or should not be entitled to any increase in premium rates on such classes of insurance, and these defendants further assert that in order to arrive at any comprehensive and accurate conclusion of the experience of this plaintiff in its writings of insurance on said classes of risks for said period of time, all as aforesaid, it is necessary that this defendant examine into the whole of the [fol. 763] records of this plaintiff as kept by it at its home office or branch offices having such records covering all of the items of experience of this plaintiff on such risks in the State of Missouri, and in such examination to include many other items of income and outgo than those set forth on said tables of alleged experience as delivered to the defendant Superintendent of Insurance of the State of Missouri by this plaintiff, as shown by its Exhibit 2 attached to and made a part of its bill in equity.

Defendants deny that fire (lightning) insurance is a distinct class of insurance or that the hazards thereof are variant from other classes of insurance, or that the fixing of premium charges for the assumption of such risks involves considerations not inhering in other classes of hazards insured against by plaintiff, and these defendants deny that structure, protection, exposure and nature of contents as to inflammability and damageability are of prime importance in fire insurance, and deny that the same is the subject of scientific study, measurement and determination of hazards or that the affixing of rates of premiums thereon involves elements not pertaining to other classes. Defendants further deny that windstorm insurance is a class apart wherein the wind-resisting type of structures, geographical location respecting likelihood of storms, nature of the terrain, stability and permanence of attachment to the earth and like considerations involve problems not inhering in other hazards.

Defendants deny that the State of Missouri or that any of the other states of the Union recognize the propriety of such classification for any of such reasons, but admit [fol. 764] that the State of Missouri requires separately annually underwriting experience upon fire risks and underwriting experience upon [windstorm] risks. Defendants deny that those engaged in and familiar with the busi-

ness uniformly recognize and treat said classes as distinct and separate, in that they would be entitled to a self sustaining and profit making premium charge for insuring risks against such hazards, and deny that such classes are in fact distinct and separate so as to entitle them to self sustaining and profit making premium charges.

(6) Defendants admit that plaintiff delivered to the Superintendent of the Insurance Department of the State of Missouri a tabulation of what it represented to be the Missouri experience of the plaintiff for the period 1924 to 1928, inclusive, which it alleges was compiled from its records, tabulating net written premiums, paid losses and expenses, and also earned premiums and incurred losses and expenses, year by year by classes for the said five-year period, but defendants deny that said tabulations so made and delivered do in fact give an accurate reflection either of net written premiums, paid losses and expenses, earned premiums or incurred losses and expenses, either year by year or for the five-year period, and defendants further deny that such tabulations include all items necessary to take into consideration in determining a true profit and loss statement of this plaintiff in its Missouri experience for the period 1924 to 1928, inclusive, or for any one year thereof.

[fol. 765] Defendants have no means of knowing and do not in fact know what plaintiff has comprehended in its terms as alleged on page 12 of its bill in equity of "net written premiums," "paid losses and expenses," "earned premiums" and "incurred losses and expenses," and therefore these defendants deny both the definition of those terms as used by plaintiff in its bill in equity, and the application of the figures under such headings as alleged by plaintiff in its bill in equity as coming within the definitions of said terms as set forth by plaintiff in its bill in equity, and therefore puts plaintiff upon strict proof in respect thereto.

Defendants deny that the table of figures and the statement made in respect thereto shown on the first half of page 13 of the plaintiff's bill in equity are correct, and state that said figures are in fact incorrect and that said totals therein set forth do not in any wise reflect the true experience of the plaintiff on its Missouri business for the period of 1924 to 1928, both inclusive, as therein set forth, and further deny that the basis of figuring un-

derwriting profits therein set forth is a proper or sufficient basis on which to determine underwriting profits.

Defendants further deny that the profit or loss upon the business of the plaintiff is properly to be computed upon the basis of earned premiums as income and incurred losses as outgo, but admit that figures alleged to be upon such basis were submitted to the Superintendent of In- [fol. 766] surance, defendant herein, but deny the accuracy of such figures so submitted on said basis and deny the propriety and sufficiency of such basis, and defendants further deny that the table of figures shown in the second half of page 13 of plaintiff's bill in equity are in fact correct figures or make a true reflection of the experience of plaintiff on its Missouri business in such classes set forth, and deny that such basis is a proper basis for determining any such experience.

Defendants deny that the experience of the plaintiff in the year 1929 submitted by plaintiff in its Exhibit 3, attached to and made a part of the bill in equity, is the correct experience of said plaintiff on Missouri business on the classes covered and set forth in said Exhibit 3, and states that such figures so submitted are in fact inaccurate and worthless for consideration in determining the true experience of the plaintiff on its Missouri business for the year 1929 on the classes covered therein, and further state that the bases of determining underwriting profits as set forth in plaintiff's Exhibit 3, are in themselves insufficient and do not furnish a true basis for the determination of underwriting experience, nor do they furnish any basis for the determination of and measurement of the reasonable profit to which this plaintiff may be entitled in the conduct of the business of insurance in the State of Missouri.

Defendants deny that the aggregate experience of stock fire insurance companies doing business in Missouri for the five year period 1924 to 1928, both inclusive, which was submitted to the Superintendent of Insurance, defend- [fol. 767] ant herein, with plaintiff's Exhibit 1, and as the same is set forth on page 14 of plaintiff's bill in equity, is accurate or that the figures therein set forth or any of them are correct, but state that in truth and in fact such figures are incorrect and as such do not reflect the true experience of the stock fire insurance companies doing business in the State of Missouri for that period,

and further state that the basis for figuring underwriting profits as therein set forth is in itself insufficient and not a proper basis on which to determine such profit.

Defendants further deny that said companies in the aggregate suffered a loss from the conduct of their business above income in the State of Missouri; namely, incurred losses and expenses in excess of premiums earned by them on their business of fire insurance or upon windstorm insurance, or upon the total of their business in Missouri, and further deny that their outgo exceeded their income upon such classes or upon all classes, and defendants further deny that the table of figures shown at the top of page 15 of plaintiff's bill in equity are correct figures, but state that such figures are incorrect and inaccurate and wholly worthless for the determination of underwriting profit or loss, and defendants further state that the basis of determining underwriting profits as therein set forth is an incorrect basis and does not in fact reflect actual profit or loss.

(7) Defendants deny that the plaintiff will, if it continue the writing of its business of fire and windstorm [fol. 768] insurance at rates existing on December 30, 1920, in so doing conduct its business in each such class and or upon all of its business of insurance in Missouri, at an actual loss or at any loss, and deny that the said plaintiff will under such circumstances receive no compensation whatever for the doing of said business, and deny that the outgo of the plaintiff from the conduct of such business in such classes at such rates will upon the whole exceed its income.

Defendants deny that the outgo of the plaintiff on said fire and windstorm classes of insurance on its Missouri business has been in excess of its income from more than six years prior to June 1, 1930, or for any period of time prior to June 1, 1930.

Defendants deny that the plaintiff has during the period of five years from 1924 to 1928, inclusive, and in the year 1929, or during any one of said years or any part of any one of said years, conducted its business of fire insurance and windstorm insurance in Missouri at a loss, and deny that it has conducted any of its business, either in part or in whole, during any of said period of time at a loss, and defendants further deny that the plaintiff will suffer any loss in the future if it continue writing the

business of fire and windstorm insurance or any of its insurance business at rates existing prior to June 1, 1930, and defendants deny that the outgo of the plaintiff on account of its Missouri business, either by classes or in [fol. 769] whole, may be in excess of income, either by classes or in whole, and defendants deny that the plaintiff does now suffer a daily loss in the conduct of its business in the amount set forth in plaintiff's bill in equity, or in any amount whatsoever, or that it will hereafter suffer any loss if it be not permitted to increase the level of its premium rates upon the classes of fire and windstorm insurance.

Defendants deny that the income of the plaintiff in the conduct of its fire and windstorm insurance business in the State of Missouri, or on any of its business is so low as to be inadequate to meet losses and reasonable expenses and to give plaintiff any reasonable compensation, or that if said business is conducted at the rates charged by this plaintiff prior to June 1, 1930, the same will prevent the plaintiff from having a reasonable profit from its Missouri insurance business.

Defendants further deny that if the plaintiff conduct its business of fire and windstorm insurance and its insurance business generally at rates which it charged prior to June 1, 1930, that it will either be forced to do business at a loss or withdraw from the doing of such business in the State of Missouri.

(8) Defendants admit that the plaintiff has an established business in the State of Missouri and has agency connections in the State of Missouri, but defendants state that they have no knowledge in respect to any agency contracts that the plaintiff may have with divers agents [fol. 770] in the State of Missouri, and therefore deny that said plaintiff has any agency contracts with any agents in the State of Missouri. Defendants state that they have no knowledge in respect to what it or may be referred to as an agency plant, and therefore deny that the plaintiff has created a business commonly known as an agency plant or that it has created any good will in respect to its business in the State of Missouri, and defendants further deny that the plaintiff has created maps, surveys and rating records individually and that such records as it may have created have become a part of the records of the Missouri Inspection Bureau, but defendants admit that

the plaintiff may have contributed in money to the Missouri Inspection Bureau. Defendants deny that the plaintiff has an established business in the State of Missouri respecting fire and windstorm insurance of the value of more than $5,000 or of any value whatever, and defendants further deny that any value would be destroyed if the plaintiff be required to abandon any business it has in the State of Missouri. Defendants deny that the plaintiff conducted its business on rates charged by it prior to June 1, 1930, on an inadequate or confiscatory basis, and deny that if it continue to conduct its business on the basis of rates charged by it prior to June 1, 1930, it would be compelled to withdraw from the doing of such business in the State of Missouri, and defendants further deny that the plaintiff would be deprived of its property without due process of law or that its business under such conditions [fol. 771] would be confiscated at a loss to it, and defendants further deny that the plaintiff has during the time it has been conducting the business of fire insurance in the State of Missouri conducted the same prudently, economically and soundly. Defendants admit that plaintiff is entitled by law to conduct its business at a reasonable profit, and defendants assert that said plaintiff has been conducting its business in the State of Missouri during all the times it has been authorized to do business in the State of Missouri at a reasonable profit.

Defendants deny that the defendant Superintendent of Insurance of the State of Missouri had failed and refused prior to the filing of plaintiff's bill in equity, to approve the increase of 16 2/3% on fire (lightning) and windstorm insurance risks in the State of Missouri on behalf of the plaintiff, but states that in fact said defendant Superintendent of Insurance has been at all times and is now proceeding to examine into the facts in respect to such risks to determine if such increase or any increase would in fact be warranted, based upon the experience of this plaintiff in such business in the State of Missouri. Defendants state that neither the defendant the Superintendent of Insurance nor the defendant the Attorney General of the State of Missouri had threatened any action or had designed any action prior to the filing by the plaintiff herein of its bill in equity, to prevent said plaintiff from charging an increase of 16 2/3% in rates on such [fol. 772] classes of insurance, without the approval of the said Superintendent of Insurance, but state that on

the contrary the defendant the Superintendent of Insurance, on the advice and counsel of the defendant the Attorney General of the State of Missouri, promptly upon receiving the notice of plaintiff as set forth in Exhibit 1, attached to and made a part of plaintiff's bill in equity, proceeded with all dispatch and speed to examine into the facts to determine if any change of rates by way of increase was in fact warranted, and at the time of filing herein of its bill in equity was continuing in his examination of said facts and that he is still continuing in his examination of said facts to determine if in fact any increase in premium rates on such classes of insurance, and if so to what extent, should be by him approved. Defendants deny that the value of plaintiff's established business in the State of Missouri, if any, is in anywise lessened or destroyed or would in anywise be lessened or destroyed if in fact the proposed increase of 16 2/3% in premium rates on such classes of insurance were by the defendant Superintendent of Insurance of the State of Missouri disapproved.

Defendants deny that Section 6274, Revised Statutes of Missouri 1919, is unreasonable, confiscatory, unconstitutional and void against the plaintiff for any reason, and further deny that said statute provides no method or means for compelling or enforcing action by the defendant Superintendent of Insurance of the State of Missouri, to enforce [fol. 773] or obtain his approval or compel a ruling upon any application for an increase in premium rates on any class of insurance or upon insurance as a whole, and further denies that the Supreme Court of Missouri has construed and interpreted said statute to place the arbitrary right of approval or disapproval of the proposed increase in the Superintendent, and defendants further deny that the Supreme Court of Missouri has ruled or that it is in fact true that if the defendant Superintendent of Insurance of the State of Missouri fail to act or disapprove there is no means or method provided or permitted by law in the state whereby relief may be had from any confiscatory effect of any such action.

Defendants further deny that said Section 6274, Revised Statutes of Missouri 1919, or any other statute in respect to the operation of stock fire insurance companies in the State of Missouri, either as written or as applied are or are designed to be or are in fact in derogation of the con-

stitutional rights of the plaintiff, and deny that the same operate as a deprivation of property and liberty of contract of the plaintiff herein without due process of law, and deny that said laws in fact or as construed or as applied deny an equal protection of the laws to the plaintiff in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and Section 30, Article 2, of the Constitution of the State of Missouri.

[fol. 774] Defendants deny that Section 6274 of the Revised Statutes of Missouri for 1919, or any other of the laws of the State of Missouri, do not provide any standard, rule or guide whereby the Superintendent shall be governed in his consideration of an application for approval of any application for an increase of the rates of premium on any class or classes of Insurance, and deny that the same permit such determination to rest in the untrammeled and arbitrary discretion of the Superintendent of Insurance; and defendants state that should such Section or any other of the Laws of the State of Missouri fail to provide any standard, rule or guide for the Superintendent of Insurance to follow in his consideration of any application for increase in rates of premium on insurance in the State of Missouri, the same would not be violative of Section 1 of the Fourteenth Amendment of the Constitution of the United States, or in contravention of Article 3 and of Section 1 of Article 4 and of Section 30 of Article 2 of the Constitution of the State of Missouri, or any one thereof, and defendants state that in order to be so violative, if at all, there must be an application by the Superintendent of Insurance of the State of Missouri of such section or other Laws of the State of Missouri and Federal Constitutions, and defendants deny that the action of the Superintendent of Insurance of the State of Missouri, defendant herein, in respect to the application for an in-
[fol. 775] crease in premium rates on fire (lightning) and windstorm insurance by the plaintiff herein, is in fact such as to constitute a violation of any such constitutional guaranties, either under the Missouri Constitution or the United States Constitution.

Defendants admit that Sections 6270 and 6287 do by Section 6274, all in the Revised Statutes of the State of Missouri for 1919, impose obligations only upon stock fire insurance corporations and that 'all companies organized under Articles 16, 17 and 18, Chapter 50 of the Revised Statutes of Missouri for 1919,' are exempted from the opera-

tion of said provisions, and that such requirements are not imposed upon individuals or associations of individuals styled reciprocal insurer or mutual insurance companies and defendants admit that such insurers so mentioned other than stock fire insurance companies do a large business of fire and windstorm insurance in the State of Missouri, and defendants further admit that such insurers are in competition with the plaintiff.

Defendants deny that the actions of the defendant Superintendent of Insurance of the State of Missouri, under Section 6274, deprives the plaintiff of the equal protection of the law or of its property and liberty of contract without due process of law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United [fol. 776] States. Defendants deny that the provisions of Section 6274, Revised Statutes of Missouri for 1919, are imposed upon incorporated companies only. Defendants deny that the amount of indemnity and premium to be charged for undertaking hazards of fire and windstorm insurance is a matter of private negotiation and agreement and deny it is a natural right, but defendants admit that there is no power to compel the plaintiff or any other stock fire insurance company doing business in the State of Missouri to write insurance at any specific rate, but deny that any examination has been made or report made or in process of being made by these defendants or either of them to compel this plaintiff to write insurance on any risk at any particular rate, and defendants state that there is ample power under the Laws of the State of Missouri and under the Constitution of the United States [of] prohibit this plaintiff from writing any insurance on any [risk] for any rate of premium, unless and until the same is written and ch rged for under and pursuant to the Laws of the State of Missouri and such rules and regulations as are lawfully promulgated under and by virtue of such Laws of the State of Missouri. Defendants deny that these defendants or either of them have in anywise attempted to question any rate or charge for services rendered by the plaintiff to others. Defendants state that there is ample authority in the Laws of the State of Missouri and under the Constitution of the United States to impose such restrictions on this plaintiff as may be proper in respect to its conduct in the State of Missouri in [fol. 777] the writing of insurance on fire and windstorm and all other classes of risks, and that the doing by these

defendants or either of them under the Laws of the State of Missouri as now existing of all such actions as prescribed and authorized by the Laws of the State of Missouri is not a taking of private property of the plaintiff without due process of law nor is it a denial of the equal protection of the law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(9) Defendants deny that there is no specific rule or guide provided in the Statutes of Missouri guiding or directing the action of the Superintendent of Insurance of the State of Missouri to be taken under and pursuant to Section 6274, and defendants deny that said Section is by the language thereof or in its purport or intent, designed to apply only to reductions ordered by the Superintendent of Insurance of the State of Missouri, and defendants further deny that said Section is violative of the law or of the Constitution of the United States or of the Constitution of the State of Missouri. Defendants further deny that this plaintiff has any power, right or authority to allege, assert or state or speak for the defendant Superintendent of Insurance of the State of Missouri in respect to any construction of the Statutes of the State of Missouri, and these defendants assert that they are represented by counsel whom they deemed to be competent to plead for them in respect to the making and [fol. 778] application of the Statutes of the State of Missouri involved in the consideration of rate reductions and increases as applied to premium rates on fire and windstorm insurance risks and allied lines of insurance risks in the State of Missouri written by this plaintiff or any other insurance company.

Defendants state that this defendant, the Superintendent of Insurance has been considering the application of plaintiff herein for an increase of rates in 16 2/3% on fire and windstorm insurance upon the merits thereof and will continue to do so, and denies that the plaintiff will be debarred of any consideration of its said application on the real merits thereof.

Defendants deny that the defendant Superintendent of Insurance has delayed in acting upon or approving the increase of 16 2/3% upon fire (lightning) and windstorm insurance rates in the State of Missouri and that he has failed to act thereon with reasonable dispatch and speed and deny further that the Statute makes any threats or

that these defendants have made any threats and deny that any or all of said actions or failure to act operate to confiscate the property of the plaintiff from day to day; defendants further deny that defendant Superintendent of Insurance has failed to act in respect to said application of plaintiff, but on the contrary they assert that the defendant Superintendent of Insurance has promptly upon receiving the notice from the plaintiff hereinabove referred to been conducting an examination into the facts and will [fol. 779] continue to do so, to determine if any increase in fact is warranted, and defendants deny that his actions so taken are or have been in violation of the constitutional rights of the plaintiff, and further deny that the said defendant Superintendent of Insurance has applied any Statute of the State of Missouri so as to work a confiscation of the plaintiff's property.

Defendants deny that the guides, rules and standards set up by Section 6283 of the Revised Statutes of Missouri for 1919 as applied to any action of the Superintendent under Section 6274 of the Revised Statutes of Missouri for 1919 set up or furnish an unreasonable or confiscatory, unconstitutional or void set of rules, standards or guides, and defendants deny further that the cost of the acquisition of plaintiff's business in respect to the commissions paid to agents is a cost paid under contract, and deny that the commissions paid are imposed upon the plaintiff by competitive conditions, and further deny that the plaintiff is required or compelled to pay commission rates commonly obtaining for acquisitions of such business by competitors or rates or commissions generally demanded and received by agents employed by competitors of plaintiff, and deny that plaintiff is bound to conform to such alleged conditions, if it desires to receive and obtain any business in the state, and defendants deny that if the plaintiff should decline to pay the going rates of commission said agents would refuse to do business with the [fol. 780] plaintiff or in the alternative would give their desirable business to competing companies. Defendants deny that the items of cost of administration and acquisition expense of the plaintiff are reasonable, moderate and prudently expended. Defendants further deny that the plaintiff has soundly, conservatively and reasonably regulated its expense, considering the nature of its business in respect to its acquisition cost or in its administration expense or in other expenditures made by it in and about its

said business in Missouri, and defendants state that this plaintiff has been wanting in reasonable frugality in such respects. Defendants admit that the plaintiff is represented by agents who likewise represent other stock fire insurance companies, but state that said plaintiff is not confined to such agencies in the acquisition of fire and windstorm insurance business.

Defendants states that this plaintiff and all other stock fire insurance companies doing business in the State of Missouri can, if they desire, absolutely regulate the cost of acquisition of insurance business through agencies writing insurance, and these defendants further state that the rates of commission paid by this plaintiff and other stock fire insurance companies doing business in the State of Missouri in some localities and in respect to certain risks among the fire and windstorm insurance risks are excessive and unreasonable and are not such as should be taken into consideration in whole in determining a proper ex-
[fol. 781] pense ratio as applied in an examination to determine if said insurance companies are conducting the business of fire (lightning) and windstorm insurance in the State of Missouri on an economically sound and reasonably frugal basis.

Defendants deny that Sections 6274 and 6283 of the Revised Statutes of Missouri for 1919 are in their terms or by application, unreasonable, arbitrary, void and unconstitutional, and further deny that in their application the business of insurance is subjected to the judgment, whim and caprice of the Superintendent of Insurance. Defendants deny that the business of the plaintiff is a private business in the sense that the same cannot be regulated, but on the contrary state that such business is a business impressed with the public interest and subject to regulation. Defendants deny that the investment profits of the plaintiff do not furnish a proper subject for consideration in the determination of reasonable profits in insurance allowable to this plaintiff. Defendants neither admit nor deny that the Statutes in respect to acquisition expense and administration expense and earnings of companies, including investment profits require that the same be considered in the aggregate of all companies doing business in the state for the reason that such is a conclusion of law and has no proper place in the bill in equity of the plaintiff, as shown on page 22 thereof, or in any other pleading in said case, but defendants deny that the con-

sideration of such items in the aggregate provides a stand-
[fol. 782] ard that is unreasonable, arbitrary and confiscatory, and deny that the standards set up in Section 6283 are null and void and not enforceable, and defendants further deny that no standards of action on the part of the defendant Superintendent of Insurance exist by virtue of any provision of Section 6274 or by the standards applicable thereto recited in Section 6283, and deny that there are not any standards, rules or guides in any other Sections of said Statutes. The defendants further deny that Sections 6274 and 6283 of the Revised Statutes of Missouri for 1919 are in contravention of Article 3 and of Section 1 of Article 4 and of Section 30 of Article 2 of the Constitution of Missouri, and deny that such sections deny to the plaintiff the equal protection of the laws, and deprive it, the plaintiff, of its property, without due process of law, in contravention of the First Section of the Fourteenth Amendment to the Constitution of the United States.

Defendants deny that the investment of moneys of the plaintiff now or for any time during the period from 1924 forward or prior to that time were in nowise within the power or jurisdiction of the State of Missouri or that the investments of the planintiff were of its own moneys in the sense that the earnings on the same could not or should not be taken into consideration in the determination of income for the purpose of determining profits on insurance business of the plaintiff in the State of Missouri, and further deny that the same were in nowise derived [fol. 783] from the business of the said plaintiff in the State of Missouri. Defendants have no knowledge, and therefore can neither deny nor affirm the statement of the plaintiff that the investment of the moneys in question was conducted by the plaintiff at its home office outside the State of Missouri, and therefore puts plaintiff upon its proof as to the point of the said investment, whether it be at its home office or at some other point, and whether the same be located within or without the boundaries of the State of Missouri.

Defendants deny that the investment profits of the plaintiff are not in anywise a proper element to be taken into account or to be treated as profits from the conduct of its business of insurance in the State of Missouri, but on the contrary state that all investment profits and investments representative of unearned premiums on business

of the plaintiff in Missouri derived from fire (lightning) and windstorm insurance are proper to be taken into account as an income of the plaintiff to determine if it has or has not been earning a reasonable profit on its Missouri business, and defendants further deny that the conduct of business of insurance by the plaintiff in the State of Missouri is a distinct and separate business from the business of investing its moneys and earning a profit thereon, so as to preclude a consideration of the latter character of its business in a consideration by the Superintendent of Insurance of the question as to the amount of the profit the [fol. 784] plaintiff is and has been earning during the period 1924 to 1928, inclusive, and whether the same is reasonable or unreasonable.

Defendants state that the Superintendent of Insurance of the State of Missouri has, under the Laws of Missouri and the Constitution of the United States, a lawful and constitutional power to consider and take into account investment profits of the plaintiff and defendants deny that the plaintiff has had no investment profits and deny that it has not had any other profits in the State of Missouri on business arising in the State of Missouri during the period 1924 to 1928, both inclusive. Defendants state that the defendant Superintendent of Insurance has a lawful and constitutional warranty to take into account and to weigh and consider investment profits of the plaintiff herein and all stock fire insurance companies doing business in Missouri, competitors of the plaintiff, for the purpose of determining the profit or loss of plaintiff on its conduct of the business of insurance in the State of Missouri.

Defendants deny that Sections 6274 and 6283 of the Revised Statutes of Missouri for 1919, or either of them, or the rules, guides and standards therein provided or the action or contemplated action of the defendant the Superintendent of Insurance of the State of Missouri, pursuant thereto, would be an invasion of the constitutional rights of the plaintiff or that they deny to the plaintiff the equal protection of the laws or deprive it of its property and [fol. 785] liberty of contract without due process of law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Defendants deny that the business of the plaintiff was conducted at all times as alleged in said bill in equity up-

on an economical basis under the guidance of experienced and prudent managers, or that the same was run and established and soundly conducted and state that the said defendant Superintendent of Insurance has full warrant and authority to investigate, ascertain and determine if in his opinion said business has been economically conducted so far as such investigation, ascertainment and determination comes within the purview of Section 6283 of the Revised Statutes of Missouri for 1919.

Defendants deny that the consideration of whether the investments of the plaintiff are well or badly made or whether the manner of the making of them is reasonable or unreasonable, in nowise enters into an examination of the profit or loss occasioned by the conduct of the business of the plaintiff in the State of Missouri, and defendants further state that whether the plaintiff has at any time asserted or claimed that losses upon investments should in anywise be charged against the State of Missouri [if] of no consequence in a consideration of the question as to whether investments are well and prudently made. Defendants deny that the conduct by the plaintiff of its investments is distinct and separate and that the same is in nowise related to the determination of [fol. 786] the profit or loss on its business of fire or windstorm insurance in the State of Missouri, but on the contrary defendants state that investment profits are and of necessity must be taken into account in the determination of the question of the reasonable profit allowable to plaintiff in the conduct of its business in Missouri.

Defendants deny that the standards, rules and guides specified in Sections 6274 and 6283, Revised Statutes of Missouri for 1919, are arbitrary, oppressive, unreasonable, unlawful and unconstitutional for the reasons stated in the third full numbered paragraph on page 25 of the plaintiff's bill in equity.

Defendants deny that the basis upon which the business of the plaintiff is conducted, so far as the acquisition of insurance business is concerned, was formulated by its managers and trustees, but admit that it is conducted by the employment of agents compensated by commissions, such commissions being graduated according to the nature of the risk, but the defendants state that the managers and trustees of the plaintiff compensate their agents in large measure upon the basis of what is requested by

the agents, and that said schedule of commissions has no necessary relation to the expense and cost on the part of the various agents doing business and that it has no relation whatever to competitive costs arising out of the methods of the conduct of the business of other stock fire insurance companies, individuals and associations of individuals in competition with the plaintiff. Defendants ad- [fol. 787] mit that the basis of doing business in the state in acquiring, handling, managing and conducting the same, are in a measure matters in which the plaintiff has a right to exercise its judgment and the judgment of its directors and officers, but defendants state that defendant the Superintendent of Insurance may lawfully and constitutionally condemn the basis upon which such business exists if such basis is in fact a basis showing a profligate and uneconomical basis of acquisition and management and has no relation whatever to any reasonable expenditure in respect to expense or losses and whether or not expenditures for expenses and losses are reasonable or unreasonable so far as the same touch the question as to what items should be taken into consideration in a determination of the question of whether the plaintiff is or is not making a reasonable profit upon its Missouri business, and the same is one in respect of which the Superintendent of Insurance of the State of Missouri may lawfully and constitutionally inquire, and in good faith determine.

Defendants deny that there is no power in the State of Missouri in the investigation of the propriety of fire (lightning) and windstorm insurance rates and rates on other classes of insurance to inquire into, and if the same warrants to make the same dependent upon whether the business of investment of the plaintiff and other stock fire insurance companies are conducted in a safe and reasonable manner. Defendants admit that the rates charged [fol. 788] and sought to be charged are in the first instance predicated upon a measure of the hazards undertaken but deny that such is an exclusive predication in fact or in law and state that a determination of the propriety of the rates involves and embraces a consideration of investment profits and assert that the same is related to and is a reasonable matter for consideration in the fixing or determining the propriety of insurance rates.

Defendants deny that upon the foregoing consideration said Sections 6274 and 6283 of the Revised Statutes of Missouri for 1919, or either of them, is null, void and unconstitutional or deny to the plaintiff the equal protection of laws or deprive the plaintiff of its property without due process of law, in contravention of the First Section of the Fourteenth Amendment to the Constitution of the United States.

Defendants deny that Section 6274 and other sections relating to the subject of regulation of rates in the State of Missouri and other statutes of the State do not in anywise provide that any notice should be given to the plaintiff or any hearing be granted if the Superintendent of Insurance shall challenge or question the notification given to him of an increase of rates, and defendants assert and state that if in fact no notice is provided for or given these defendants that that would in itself constitute a failure of due process of law and defendants allege and state that the defendant Superintendent of In- [fol. 789] surance has the power and right to proceed to examine into the facts of and about and concerning any proposed increase in rates asked by the plaintiff, and if the facts as developed under and by virtue of the rules and standards provided show that said plaintiff is making a reasonable profit on rates existent [priot] to the addition of any increase, then said defendant Superintendent of Insurance has the power and right under the said statutes to prevent said plaintiff from placing said increase in effect, unless and until it shall have proceeded to a review as provided by said statutes, and the defendants therefore deny that said Sections 6274, 6283 and 6287 are null and void and violative of constitutional rights of the plaintiff, as set forth in Section 1 of the Fourteenth Amendment to the Constitution of the United States. Defendants specifically deny that they or either of them in fact threatened any action looking to the revocation or cancelling of the license of the plaintiff or its agents, or looking to the assessment of penalties of fine or imprisonment, as provided by said statutes at any time, in connection with this plaintiff.

Defendants deny that the construction of Sections 6274, 6283 and 6222 of the Revised Statutes of Missouri for 1919, as set forth in subparagraph (e) on pages 29 and 30 of plaintiff's bill of complaint, makes the same un-

constitutional and void and violative of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and deny that said construction and operation of [fol. 790] said statutes as so construed is arbitrary, unreasonable and unconstitutional or would in anywise work a confiscation of plaintiff's property, without due process of law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States, and defendants further deny that the method of the determination of underwriting profits of the plaintiff as therein inferentially contended for by plaintiff, to-wit, the so-called earned and incurred basis, is a proper or lawful basis for the determination of the question whether or not plaintiff is making more than the reasonable profit.

Defendants deny that a proper construction and application of Section 6283 of the Revised Statutes of Missouri for 1919 would in anywise work to confiscate or deprive the plaintiff of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States or of Section 30 of Article 2 of the Constitution of the State of Missouri, as alleged in subparagraph (f) on page 31 of plaintiff's bill in equity.

Defendants deny that the business of fire insurance is a private business in the sense that it may be conducted without let or hindrance by or from the State of Missouri as expressed by the existent legislative acts thereof, but defendants admit that the business of fire insurance may be transacted by private persons in an individual capacity or by unincorporated associations and incorporated [fol. 791] companies. Defendants deny further that the amount of indemnity or premium is a matter of private negotiation and agreement in the sense that the same may not be by proper legislative act confined to such indemnity or premium as will return to the company so writing such insurance not to exceed a reasonable profit. Defendants deny that the business of insurance is a natural right and deny that the business of insurance as conducted by this plaintiff receives no privilege from the State, and further deny that the rates in respect to insurance writing of this plaintiff may not be kept to a point and figure that will return to this plaintiff not to exceed a reasonable profit thereon. The defendants admit that the State

of Missouri cannot compel this plaintiff to enter into any contract of insurance.

Defendants deny that the business of the plaintiff, the same being the business of writing insurance, is not a public business, but on the contrary state that it is affected with a public interest to such an extent as to empower the State of Missouri to keep the rate of charge made by this plaintiff and others engaged in such business to such a figure that the profit on such business shall not exceed a reasonable profit. Defendants deny that the statutes of the State of Missouri herein referred to either in their terms or in their application in the instant case accomplish a taking of the private property of the plaintiff for public use or deprive the plaintiff of its property [fol. 792] without due process of law or deny to the plaintiff the equal protection of the laws, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and of Section 30, Article 2 of the Constitution of the State of Missouri.

Defendants deny said statutes or any of them either arbitrarily or unreasonably restrain or curtail or interfere with the right of the plaintiff on the one hand and its customers, the insured, on the other, to contract as to the rates to be charged by the plaintiff and paid by the insured, or that the same deprive the plaintiff of its property or liberty of contract, without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, or of Section 30 of Article 2 of the Constitution of the State of Missouri.

Defendants deny that Sections 6274 and 6283 are in anywise unconstitutional and further deny that said Section 6287 of the Revised [States] of Missouri for 1919, if the penalties therein prescribed are applied to said plaintiff, is unreasonable, arbitrary, unconstitutional and void, or deprives the plaintiff of its property and liberty of contract without due process of law, in violation of the First Section of the Fourteenth Amendment to the Constitution of the United States, all as alleged in subparagraph (h) on pages 32 and 33 of plaintiff's bill in equity, and these defendants further state to the Court that the allegations [fol. 793] set forth in said subparagraph (h) on page 32 and to the end of the first paragraph on page 33 of plaintiff's bill in equity, as the same touch any allegation that the

defendants herein, or either of them were threatening any action of any kind under said Section 6287 of the Revised Statutes of Missouri for 1919, are now and were at the time said bill in equity was filed, altogether false and untrue and known by the plaintiff at that time to be false and untrue, and such allegations were made knowingly by the plaintiff merely to serve it as a basis for asking this Court for a restraining order against the defendant Superintendent of Insurance, and defendant the Attorney-General of the State of Missouri, from in anywise interfering with the putting into effect by the plaintiff of an unwarranted and unlawful increase in the rates of premiums on fire and windstorm insurance risks to the extent of one-sixth of the rates then in effect, said plaintiff well knowing that the defendant Superintendent of Insurance of the State of Missouri was proceeding with all proper speed and dispatch to examine into the facts in connection with the application of the plaintiff for such increase, and that said defendant Superintendent of Insurance had not at that time completed his examination, but that he would do so within a reasonable time. Said plaintiff well knew that it was not in fact entitled to any such increase and being conscious of the fact that an examination of the data on the books and records by the [fol. 794] Superintendent of Insurance would disclose a condition in profit and loss directly contrary to the Statements made by this plaintiff to the Superintendent of Insurance in respect to its experience on Missouri business for the years 1924 to 1928, both inclusive, as reflected in its figures filed with the Superintendent of Insurance, sought the method of arbitrarily and without right or reason putting into effect the increase and then misrepresenting to this Court the alleged contemplated actions of the defendant, in order to get a restraining order to prevent any action by this defendant Superintendent of Insurance. Plaintiff further well knew that defendant the Attorney General of the State of Missouri would not in anywise proceed to enforce the penalties provided in Section 6287 of the Revised Statutes of Missouri for 1919, without being requested to do so by the defendant Superintendent of Insurance and this plaintiff well knew that the defendant Superintendent of Insurance had made no such request, nor had he in mind making any such request, for the reason, as plaintiff well knew, that he was proceeding at the time to an orderly and speedy examination

into the facts touching the experience of the plaintiff in the business of insurance in Missouri for the period 1924 to 1928, both inclusive.

(10) Defendants admit that Section 6311, Revised Statutes of Missouri 1919, as alleged on pages 33 and 34 of plaintiff's bill in equity, is unconstitutional, and deny that defendants intend to attempt to enforce it, and allege [fol. 795] and charge the fact to be that said section is no part of the legislative scheme and policy of the State of Missouri for the regulation of insurance rates.

(11) Defendants deny that the business in which the plaintiff is engaged in highly competitive or that it is subject to gre ; fluctuations, or that the volume of such business is affected by changes in the value and price of commodities, materials and structures, or that the amount of insurance carried by persons insuring property is affected by the shifting of values or that the volume and proportions of the business subject to be acquired by the plaintiff is affected by the number and power of its competitors, or that [lossess] are gravely affected by the conditions of general business and conditions of prosperity or otherwise or by the concentration of values. Defendants further deny that there has been recently any marked shrinkage in commodity prices and values or that there has been an increase in the number of those engaged competitively in business with it, or that there has been a slackening of industry which has tended to demoralize and increase losses or lessen the watchfulness of property owners, or that there has been a concentration of insured values in centers where insurable property exists over and above what it normally is, and defendants further deny that the elements entering into the consideration of the future are indicative of a less favorable experience for the plaintiff [fol. 796] upon its business in Missouri for the future than in the past, but on the contrary state that all indications are and the tendencies, so far as they can now be divined, point to a more favorable experience for the future in respect to the business upon which the plaintiff is engaged and a more favorable experience in the future so far as the plaintiff is concerned in the conduct of its business.

Defendants deny that in the business of insurance its capital is not employed in the business and invested therein, although it may be that it is not invested in physical

properties as is true in [commericial] lines or by railroads or utilities, but defendants state that the capital invested by this plaintiff in the business of insurance is to all intents and purposes as closely tied into the business as is the capital of public utilities tied into the business in which such utilities are engaged.

Defendants deny that the plaintiff is required by law and that it does keep its capital separate and intact or that it is in the nature of a guaranty fund in any sense different from the capital invested and employed in the conduct of a railroad or public utility, but defendants admit that the plaintiff is prohibited from continuing the business of insurance if its capital in anywise becomes impaired by its use in payment of current losses and expenses. [fol. 797] Defendants deny that plaintiff does or has kept its capital subscribed by stockholders separate and intact, and alleges that said plaintiff keeps its capital, surplus, unearned premiums and all other separate items in one common fund, and the only effort made by it and the only requirement made of it is that it shall always have on hand an amount of paid up capital and surplus sufficient to meet the minimum requirements of the law as to solvency. Defendants further deny that a just and reasonable measure for the ascertainment of profit or loss in the business of insurance in which the plaintiff is engaged, is by the admeasurement thereof and distribution of premium charges producing an equality of charge depending upon the hazards involved and amounts insured, so as to fix rates of charges in each of said classes of fire insurance and windstorm insurance, but on the contrary the requirement of the law is and the proper measure of distribution is, so far as the requirements of the law are concerned, that the said plaintiff shall be permitted to earn a reasonable profit on all lines of its business in the aggregate. Defendants deny that in addition to sufficient income to meet losses and expenses a margin of profit of 10% of earned premiums is a reasonable profit to assure proper dividends and to produce a margin enabling the plaintiff to meet unusual and exceptional calamities and losses.

Defendants deny that 10% is a reasonable profit and [fol. 798] allege that plaintiff has earned at least 10% and will probably do so in the future. Defendants deny that plaintiff has the right to earn profits against calamities and at the same time exclude from consideration

profits so accumulated in the past which have not been used to meet such emergencies, and defendants deny that the increase so made by the plaintiff on December 30, 1929, and provided by such filing and subsequent filing to be effective June 1, 1930, is designed to and will produce less than such reasonable profit aforesaid, and deny that the past experience (1924 to 1928, inclusive) of plaintiff had five years in Missouri, and the past experience of others engaged in like business in said State for said period of five years upon fire insurance and upon windstorm insurance, and upon all insurance, was productive of an income materially less than such percentage of reasonable profit, and deny it will produce less than such reasonable profit with the increase applied for, and these defendants allege and charge the fact to be that the increase so purported to be made by the plaintiff herein is unreasonable and excessive and not warranted by the facts or the law.

Defendants further deny that the experience of the plaintiff on Missouri business for the period 1924 to 1928, inclusive, on fire insurance and/or windstom insurance or on all lines in the aggregate, was such as to produce an income materially less than that which would constitute a reasonable profit.

[fol. 799] (12) Defendants deny it is impossible to ascertain the amount of interest on unearned premium, but on the contrary assert that it is possible for plaintiff to determine with accuracy, or with sufficient accuracy so that the same may be taken into acount as a part of the income to determine whether or not plaintiff has derived an income over outgo sufficient to return to it a reasonable profit, to which it is entitled under the law, and defendants deny that the interest on unearned premiums would not exceed in amount 2% of the earned premium, or 2% of the unearned premium. Defendants further allege that the plaintiff does business in Missouri by writing policies of insurance against loss by fire, lightning, hail, windstorm and other lines of insurance, issued for a term of one, three and five years, for a consideration paid in advance, commonly called a premium. In consideration of the advanced payment of premium, the plaintiff contracts with its policyholders that it will pay the amounts of losses occurring thereafter, and by reason of the nature of such contracts of insurance the obligation to pay which is incurred by the plaintiff under its policies of insurance

is both contingent and deferred; that both of these elements of the contract must be taken into consideration to determine what is a reasonable insurance rate. Defendants allege that because the liability of plaintiff under its contracts of insurance is contingent, it is necessary to take into consideration the experience of insurance companies generally in order to determine the proportion of [fol. 800] loss to the risks incurred by issuing policies of insurance; and because plaintiff only agrees to pay after a loss has been incurred under a policy of insurance and the liability for payment is thus deferred, it is further necessary in determining a reasonable rate to determine the present value of the payment of loss as of the time when the insurance premiums are paid, or to determine the amount of money which will be earned in interest upon the premiums up until the time that the losses are actually paid. Defendants allege that the interest on unearned premiums represents the gross profit upon the insurance policies issued by the plaintiff, accruing by reason of the fact that it collects a premium in advance and in return therefor promises to make payment of loss in the future. Defendants allege that the plaintiff, by contracting with a large number of persons to pay losses in the future in consideration of premiums paid in advance, contracts for profits, the amount of which are determined by the number and size of such losses and the length of time which elapses between the acceptance of the premiums and the payment of the losses; and that the amount of profits made thereby cannot be definitely ascertained until after the payment of losses, but when the losses are paid the gross profits accruing upon the writing of the policy is the difference between money received in premiums, plus the value of the use of the money until the plaintiff has performed its obligations under the policy, [fol. 801] and the amount of losses actually paid; and the net profit of the plaintiff on said policies is the amount of such gross profits less plaintiff's expense of doing business. Defendant alleges that the actual experience of the insurance companies doing business in Missouri over a period of five years reflects an actual profit made during such period, and such experience is based upon such a large volume of business that it furnishes a reasonable and fair guide for the establishment of reasonable rates in the future.

Defendants deny that the plaintiff has any right to any increase in claimed profit from 10% of earned premiums to 12% of earned premiums, in the event interest on unearned premiums is to be considered a part of the income of the plaintiff for the purpose of determining if it has or has not derived a reasonable profit from its Missouri business for the period in question.

FOURTH

1. Defendants deny that the plaintiff will, unless it is permitted to charge an increase of 16 2/3% in premium rates on fire (lightning) and windstorm insurance on and after June 1, 1930, suffer and sustain irreparable injury and/or damage or any injury or damage, or that the plaintiff will under such conditions be compelled to issue policies of insurance and conduct its business of fire insurance and windstorm insurance in Missouri at a financial loss to the plaintiff or upon a return of income inadequate [fol. 802] to meet the expense of the conduct thereof, or that it will, in the alternative, be obliged to cease the doing of such business in Missouri or lose its agency contracts, if any, and the defendants deny that said plaintiff has any agency contracts, agency plants, established business, maps, surveys, rating records or good will of any value whatever. Defendants further deny that defendant Joseph B. Thompson, Superintendent of Insurance of the State of Missouri, and/or defendant Stratton Shartel, as Attorney General of the State of Missouri, contemplated, had in mind or would upon learning of the contemplated increase of 16 2/3% in premium rates on the classes aforesaid take any action looking to the revocation of the license of the plaintiff or its agents in Missouri to do business in the State of Missouri, but on the contrary state that defendant Joseph B. Thompson, as Superintendent of Insurance of the State of Missouri, would proceed to, as he is now proceeding to, examine into the facts in respect to such application for increase, and if such increase or any other increase were on the basis of the facts learned by him subsequent to such investigation, such as to warrant an increase, that he would approve such increase as plaintiff requested if such increase were justified by the facts in relation to said business. Defendants further deny that any criminal actions against the plaintiff or any of its agents in the State of Missouri were in contemplation under such circumstances or that any criminal action or actions would have been taken. Defendants

[fol. 803] admit that such action as would be available would have been taken by them to prevent such increase going into effect until such time as the defendants had learned after investigation whether or not this plaintiff was entitled to the increase applied for, or any increase in the premium rates on the classes in question.

Defendants deny that the plaintiff would have been occasioned a loss of not less than $50 for each day, as alleged on page 38 of the bill in equity, and state that the plaintiff would not have been occasioned any loss, and further that the plaintiff was making and would continue to make a reasonable profit on its Missouri business on the rate charged prior to the increase of 16 2/3% by plaintiff charged on and after June 1, 1930.

2. Defendants deny that they had threatened and that they are now threatening to take any unlawful or unconstitutional action against the plaintiff, and defendants deny that they or either of them asserted that they would do so until such time as the defendant the Superintendent of Insurance of the State of Missouri had the opportunity of examining into the facts in respect to the application for increase in premium rates made by this plaintiff, and if such facts as developed by such investigation warranted an increase, these defendants assert that the defendant Superintendent of Insurance would have approved such [fol. 804] increase as the evidence developed by him after investigation warranted.

Defendants further deny that such actions as are set forth and alleged in paragraph 2, pages 39, 40 and 41 of plaintiff's bill in equity, as being in contemplation by the defendants and each of them, even if taken, would be contrary to the first section of the Fourteenth Amendment to the Constitution of the United States, or that such actions would in fact deprive the plaintiff of its property and its liberty of contract without due process of law, and deny to the plaintiff the equal protection of the laws guaranteed to it.

Defendants state that the plaintiff has in fact a plain, adequate and complete remedy at law, in that the statutes of the State of Missouri concerning such matters in respect to the conduct of the business of insurance in the State of Missouri, provide a complete, adequate, plain and orderly remedy at law, and certain of the insurance companies doing business in the State of Missouri and repre-

sented by the same counsel as represent this plaintiff, have in fact instituted in the Circuit Court of Cole County, Missouri, at Jefferson City, Missouri, such an action comprehending a total of fifty-seven insurance companies doing business in the State of Missouri, which insurance companies are seeking an increase of 16 2/3% on the same classes of insurance and for the same alleged reasons and on the same alleged grounds as are set forth in plaintiff's [fol. 805] bill in equity filed herein, and it is stated further that in such action in the Circuit Court of Cole County, Missouri, said plaintiffs, being a total of fifty-seven therein, do not assert that these defendants or either of them are contemplating any such actions or threaten any such actions as are alleged, asserted and set forth in paragraph 2 of plaintiff's bill in equity as shown on pages 39, 40 and 41 of its bill in equity, nor do they or any one of them in such action request any injunctive relief of any kind, either by way of restraining order, interlocutory or permanent injunction against these defendants or either of them.

FIFTH

(Amendment to Bill in Equity)

Defendants admit, in answer to plaintiffs' amendment to its bill in equity, that the defendant the Superintendent of Insurance of the State of Missouri did on May 28, 1930, make a finding which was transmitted to and received by the Missouri Inspection Bureau, agency of the plaintiff and other stock fire insurance companies doing business in the State of Missouri, and received by said Bureau on May 29, 1930, all as set forth on pages 1 and 2 of plaintiff's amendment to its bill in equity, but defendants state that no such finding was in contemplation at the time of the filing by the plaintiff of its bill in equity herein, which was made on May 28, 1930, at 8:30 o'clock a.m., in the District Court of the United States for the Western Dis- [fol. 806] trict of Missouri, Central Division thereof, at Jefferson City, Missouri, and that such finding and order and the figures therein set forth were compiled by the defendant the Superintendent of Insurance during the day of May 28, 1930, from annual statements of this plaintiff and other stock fire insurance companies doing business in the State of Missouri, and that said finding was not made until 10:30 o'clock in the evening of said day of

May 28, 1930, and that such finding was made necessary and made in view of the filing by this plaintiff of its bill in equity at 8:30 o'clock on the morning of said day.

Defendants further state that the defendant the Superintendent of the Insurance Department of the State of Missouri was on May 28, 1930, and had been for several weeks prior to that time engaged, through examiners skilled in actuarial work in connection with the business of this plaintiff and other stock fire insurance companies writing fire and allied lines of insurance in the State of Missouri, in an examination into the facts in respect to the adequacy of the profit of this plaintiff and other stock fire insurance companies doing business in the State of Missouri, to determine if the application of this plaintiff and other stock fire insurance companies doing business in the State of Missouri, which applications were identical, should be approved or disapproved, either in whole or in part, and defendants further say that the defendant Su- [fol. 807] perintendent of Insurance of the State of Missouri was so proceeding in good faith.

(1) Defendants deny that said finding hereinabove referred as made on May 28, 1930, and set forth in plaintiff's amendment to its bill in equity on pages 1 and 2 thereof, is in any sense final nor has the defendant Superintendent of Insurance in anywise asserted that such finding is final, but on the contrary states that there has been no finding on the individual experience of this plaintiff on its Missouri business in respect to its application for such increase, but that such finding as has been made is merely a setting forth, as shown by the finding itself, of the aggregate experience for the years 1924 to 1928, inclusive, of all stock fire insurance companies doing business in the State of Missouri, and defendants further state that the defendant Superintendent of Insurance is now proceeding and has continued to proceed since May 28, 1930, as he has been proceeding prior to that time, to an examination into the application of this plaintiff and other stock fire insurance companies doing business in the State of Missouri, to determine if in fact any increase should be approved, and if so to what extent, and defendants state that it has not been possible and it is not now possible, as a physical matter, to complete such examination into the facts to warrant an intelligent determination by the defendant Superintendent of Insurance as to whether or not such applica-

tion for increase should or should not be allowed, or if al-
[fol. 808] lowed to what extent, either in whole or in part.

Defendants further deny that in making said finding on May 28, 1930, the defendant Superintendent of Insurance was in anywise doing anything other than setting forth the aggregate experience of the plaintiff and other stock fire insurance companies doing business in the State of Missouri, during said period of time from 1924 to 1928, inclusive, as shown by the annual statements filed in the Insurance Department of the State of Missouri, of which the defendant the Superintendent of Insurance has charge and supervision, in order to disclose under the sworn statement of this plaintiff and other such stock fire insurance companies the experience as shown in such annual statements, to prove that the aggregate experience set forth on page 14 of plaintiff's bill in equity was inaccurate and incorrect.

Defendants further deny that such application of Sections 6274 and 6283, Revised Statutes of Missouri for 1919, in anywise infringe upon the constitutional rights of the plaintiff, either under the Constitution of the State of Missouri or the United States Constitution.

Defendants deny that the defendant the Superintendent of Insurance of the State of Missouri has made any final approval or disapproval of said application for increase of this plaintiff or any other stock fire insurance company doing business in the State of Missouri, on the individual
[fol. 809] experience of such companies, but on the contrary assert that he, the said Superintendent of Insurance of the State of Missouri, has been proceeding and is now proceeding to an examination of the facts in respect to individual experience to determine if the application of this plaintiff and other stock fire insurance companies shall be approved or disapproved, in whole or in part, and if so to what extent, and further state that such examination is proceeding with the utmost of speed and dispatch and the utmost of good faith, and when finally terminated a final ruling and order will be made, and that such procedure has been at all times in contemplation and now is in contemplation.

WHEREFORE, defendants deny that the said alleged order of the Superintendent of Insurance of the State of

Missouri, or that said Section 6274, Revised Statutes of Missouri, 1919, and said Section 6283, Revised Statutes of Missouri, 1919, as amended in 1923, and each of said sections as written, applied or construed, or that said finding of May 28, 1930, or either of them is such as to deprive the plaintiff of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(2) Defendants admit that the plaintiff, together with its notice to the Superintendent of Insurance of the State of Missouri under date of December 30, 1929, delivered and transmitted to the Superintendent of Insurance the alleged experience of it, the plaintiff, upon fire and wind- [fol. 810] storm insurance in the State of Missouri for the period 1924 to 1928, inclusive, year by year and in total on each of the classes of fire (lightning) and windstorm insurance, which filing is still in possession of the defendant Superintendent of Insurance, but deny that such showing disclosed or discloses that plaintiff did business in the state during said period upon either of said classes at a loss upon any proper method of the determination of underwriting profits, and deny that said plaintiff did, during such time, do such business at a loss in the State of Missouri, and on the contrary state that said plaintiff did, on such classes of insurance, do business at a large profit during such time and more than a reasonable profit during such time.

Defendants further deny that defendant the Superintendent of Insurance has attempted to determine the experience of this plaintiff on fire (lightning) and windstorm insurance in the State of Missouri for the period in consideration or on all lines of insurance on the basis of aggregate experience of all companies in the state without regard to or consideration of the individual experience of the plaintiff upon such classes or upon its whole business. Defendants deny that the said finding of May 28, 1930, hereinabove referred to, is in anywise a final finding; but state that it is merely a compilation of aggregate experience of all stock fire insurance companies [fol. 811] doing business in the State of Missouri, including this plaintiff, for the period under consideration as aforesaid, such compilation being from the sworn statements of this plaintiff and other stock fire insurance companies doing business in the State of Missouri, known as

the annual statements of said companies, and was compiled and made merely to show that the alleged experience of this and other companies as set forth on page 14 of plaintiff's bill in equity is in fact erroneous, incorrect and wholly worthless as a basis for determination of aggregate experience.

Defendants deny that said finding or 'order and ruling,' as termed by the plaintiff, or that Sections 6274 and 6283, Revised Statutes of Missouri, 1919, in anywise work a confiscation of the property of the plaintiff, in violation of the first section of the Fourteenth Amendment to the Constitution of the United States.

(3) Defendants admit that the plaintiff did separately show and disclose and file with the defendant Superintendent of Insurance, with its notice of December 30, 1929, its separate alleged experience on fire insurance and windstorm insurance during the period of five years from 1924 to 1928, inclusive, but defendants state that such alleged experience was wholly inaccurate, incorrect and wrong, and wholly worthless as showing or reflecting the true experience of said plaintiff, and defendants further deny in whole all further statements made in subpar- [fol. 812] agraph (3) on pages 6 and 7 of plaintiff's amendment to its bill in equity.

(4) Defendants admit that the plaintiff did, together with its notice to defendant Superintendent of Insurance dated December 30, 1929, file an alleged compiled experience of all stock companies in the State of Missouri for the period of five years aforesaid, upon both their alleged paid basis and alleged earned and incurred basis, and defendants further admit that the defendant the Superintendent of Insurance did, in his finding of May 28, 1930, set forth aggregate figures on all such stock fire insurance companies as shown by their sworn annual statements as filed in the office of the Superintendent of the State of Missouri, as regards income and outgo as shown thereon, and deny that such showing so made under Sections 6274 and 6283, Revised Statutes of Missouri, 1919, in anywise deprives plaintiff of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(5) Defendants admit that the defendant the Superintendent of Insurance, by his finding of May 28, 1930, aforesaid, included as losses paid and expenses of said

companies the item of $110,672,997, which item was taken from the sworn annual statements of the stock fire insurance companies doing business in the State of Missouri, including this plaintiff, such annual statements being filed in the office of the Superintendent of Insurance of the [fol. 813] State of Missouri, and defendants further state that all such items of experience are peculiarly within the knowledge of the stock fire insurance companies doing business in the State of Missouri, including this plaintiff, and such finding was made from the sworn statement of this plaintiff and other stock fire insurance companies doing business in the State of Missouri, covering the period 1924 to 1928, inclusive, to show that the figures submitted by this plaintiff and other stock fire insurance companies as set forth in the bill in equity of this plaintiff on page 14 thereof, were wholly inaccurate and incorrect, and worthless as a basis for determination of whether or not this plaintiff and other stock fire insurance companies doing business in Missouri were in fact making a reasonable profit, or more than a reasonable profit, or were writing insurance at a loss, and these defendants further state that both sets of figures, to-wit, the expense and losses figure found by the Superintendent of Insurance from the annual statements of the stock fire insurance companies doing business in Missouri, and the losses and expenses figure as set forth on page 14 of the bill in equity of this plaintiff filed herein, are and have been made and sworn to by this plaintiff and other stock fire insurance companies, and disclose either an inability on the part of this plaintiff to determine what its expenses and losses are in fact over any given period of time, or a deliberate misrepresentation of fact on the part of this plaintiff and other stock fire insurance companies doing [fol. 814] business in the State of Missouri during such period.

Defendants deny that such finding of the Superintendent of Insurance of the State of Missouri dated May 28, 1930, or that Sections 6274 and 6283, Revised Statutes of Missouri, 1919, in anywise infringe upon the constitutional rights of the plaintiff, or deprive the plaintiff of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(6) Defendants admit, as alleged in subparagraph (6) on page 9 of the plaintiff's amendment to its bill in

equity, that the defendant Superintendent of Insurance had before him upon the making of his finding of May 28, 1930, aforesaid, the alleged experiences in respect to income and outgo of the plaintiff, filed by the plaintiff with its application for increase dated December 30, 1929, but deny that such was the only evidence, and assert on the contrary that the defendant Superintendent of Insurance had before him such evidence as had been submitted over such period of time in the form of sworn annual statements by the plaintiff and other stock fire insurance companies doing business in the State of Missouri, and such evidence as is contained upon an additional report known as the 'report of underwriting experience by classes', also submitted by this plaintiff and other stock fire insurance companies doing business in the State of Missouri and sworn to at the time of such submission, such {fol. 815} reports covering the whole of the period of such time from 1924 to 1928, inclusive, and defendants further state that the defendant the Superintendent of Insurance of the State of Missouri did not make nor purport to make any final finding in respect to this plaintiff in its individual experience, but had been up to that time and is now proceeding to examine into the facts, and upon a completion of such examination will, as the facts disclose, either approve such increase asked for or disapprove the same, in whole or in part. Defendants state that the figures submitted by this plaintiff in connection with its application for increase dated December 30, 1929, are wholly inaccurate and incomplete and unreliable, and such are to this plaintiff known to be so, as disclosed by the fact that its reports on its annual statements sworn to and filed with the defendant the Superintendent of Insurance during such period of time disclose a different experience, and therefore there was no accurate, reliable evidence filed by this plaintiff or any of the other stock fire insurance companies in connection with the application of this plaintiff and others for an increase in premium rates on fire (lightning) and windstorm insurance as aforesaid.

Defendants deny that such finding was in anywise arbitrary or that it deprives the plaintiff in anywise of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

[fol. 816] (7) Defendants state that the finding of the Superintendent of Insurance of the State of Missouri, dated May 28, 1930, aforesaid, was made from the sworn statements of this plaintiff and other stock fire insurance companies doing business in the State of Missouri, known as the annual statements, and the report of underwriting experience by classes, and that such figures as are shown in said finding of May 28, 1930, are the figures submitted under oath by this plaintiff and other stock fire insurance companies doing business in the State of Missouri; that such finding was made after the filing by this plaintiff of its bill in equity; that at such time the defendant the Superintendent of Insurance was examining into the facts in respect to the individual experience of this plaintiff and other stock fire insurance companies doing business in the State of Missouri; and was proceeding with all speed and dispatch and is now so proceeding, in an effort to determine what the facts really are; that the figures submitted by the plaintiff and other stock fire insurance companies doing business in the State of Missouri in connection with its application for increase are so variant from the figures theretofore filed in the Insurance Department of the State of Missouri, as disclosed by their several annual statements and report of underwriting experience by classes, that such figures are wholly unreliable and insufficient, and it is utterly impossible, therefore, for this defendant Superintendent of Insurance of the State of Missouri to arrive at any con-
[fol. 817] clusion in respect to this plaintiff or other stock fire insurance companies doing business in the State of Missouri, as to whether or not the increase applied for should or should not be granted, either in whole or in part, and that such finding as was made by the defendant Superintendent of Insurance under date of May 28, 1930, was merely a finding in the aggregate experience as reported by this plaintiff and other stock fire insurance companies doing business in Missouri, to show and disclose that this plaintiff and other such stock fire insurance companies doing business in the State of Missouri in the submission of the figures by them in connection with their several applications for increase of 16 2/3% on premium rates on fire and windstorm insurance, were wholly unreliable and inaccurate, and on that basis their application should be disapproved. Defendants deny that said finding of May 28, 1930, or any procedure had in

connection therewith, or that said Sections 6274 and 6283, Revised Statutes of Missouri, 1919, in anywise, either in their terms or the procedure had thereunder, infringe upon the constitutional rights of the plaintiff in any particular, or that they deprive the plaintiff of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(8) Defendants admit that the plaintiff is entitled to a reasonable profit upon its business in Missouri, but deny [fol. 818] that the Supreme Court of Missouri has construed Section 6283, Revised Statutes of Missouri for 1919, to entitle this plaintiff to a profit of 8% upon its written premiums above its outgo, and defendants state that said plaintiff is not entitled to 8% of income over outgo upon written premiums.

Defendants deny that the finding of May 28, 1930, and Sections 6274 and 6283, Revised Statutes of Missouri, 1919, are in any particular alleged in subparagraph (8) on pages 10 and 11 of plaintiff's amendment to its bill in equity, or are in fact violative of plaintiff's constitutional rights or deprive it of its property or liberty of contract without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(9) Defendants deny as alleged in subparagraph (9) on pages 11 and 12 of plaintiff's amendment to its bill in equity, that the Superintendent of Insurance of the State of Missouri under the provisions of Section 6274, Revised Statutes of Missouri, 1919, has no power to approve or disapprove any application for an increase in rates on the part of this plaintiff, and defendants further deny that defendant Superintendent of Insurance has at any time or did in this instance or intends doing in this instance in respect to the plaintiff any act based upon any whim or caprice, but that said defendant Superintendent of Insurance has at all times, is now and will continue to act in the utmost of good faith in performance of the duties cast upon him by law, as he is advised by counsel.

[fol. 819] (10) Defendants deny that the plaintiff has conducted its business in the State of Missouri in the classes of fire and windstorm insurance on the basis of rates which as applied to it are confiscatory, or that stock fire insurance companies in the aggregate have so conducted their business in respect to such classes on a basis

of rates that result in confiscation, and state further that on the basis of the rates charged prior to June 1, 1930, on such classes, this plaintiff and all other stock fire insurance companies doing business in the State of Missouri and writing such classes of insurance would have made more than a reasonable profit and were making more than a reasonable profit.

Defendants deny that Section 6274 and Section 6283 and the finding of the Superintendent of Insurance of the State of Missouri dated May 28, 1930, as set out in subparagraph (10) on pages 12 and 13 of plaintiff's amendment to its bill in equity, are such as to deprive plaintiff of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(11) Defendants state that they have no knowledge in respect to the alleged difficulties in procedure in respect to the giving of notice to its agents to make the increase of 16 2/3% effective June 1, 1930, as set forth by plaintiff in subparagraph (11), page 14 of the amendment to its bill in equity, and therefore deny the same and put plaintiff upon strict proof in respect thereto, and defendants [fol. 820] further deny that the defendant Superintendent of Insurance failed to take action or failed to act or failed to make any request for any extension of time pending his examination into the facts in respect to the application of this plaintiff for an increase, nor did he in anywise indicate that he had no intention of acting upon such notice or making any approval or disapproval, but on the contrary, as was well known to this plaintiff, said defendant Superintendent of Insurance had requested an extension of time, such request being made of the manager of the Missouri Inspection Bureau, the agency of this plaintiff, through which agency the application for increase in rates had been made, and through which agency extension of time in the asserted effective date had theretofore been requested and given, and these defendants state that this plaintiff, directly and through the agency of the Missouri Inspection Bureau and its manager thereof, deliberately misled this defendant as to an extension of time for the effective date on which this plaintiff desired to put the increase of 16 2/3% into effect, and that neither this plaintiff nor any agency thereof gave this defendant any notice or warning of any kind that the bill in equity would be filed, or that it had any intention of filing such

bill in equity, and that the defendant Superintendent of Insurance had been led to believe and suppose that the extension of the effective date would be made, and that he, the said defendant Superintendent of Insurance was at [fol. 821] that time proceeding with the utmost of speed and dispatch to examine into the facts in respect to the application for an increase in rates on such classes of insurance, all of which was well known to this plaintiff and to its agents, and to its agency the Missouri Inspection Bureau, and defendants assert and state that this plaintiff has in respect to such circumstances acted in the utmost of bad faith and has deliberately designed its actions to mislead and deceive the defendant the Superintendent of Insurance of the State of Missouri.

SIXTH

Defendants herein for further answer deny generally that the plaintiff herein is entitled to any increase in rates of premium charged on fire (lightning) and windstorm insurance risks in the State of Missouri, for the reason that this plaintiff has at all times heretofore on the basis of the rates of premium charged on such classes of insurance prior to June 1, 1930, and on May 31, 1930, and prior to the increased rates of 16 2/3% on such classes of insurance, made more than a reasonable profit on each of such classes of insurance on its insurance business in the State of Missouri as a whole, and that such condition has obtained for many years prior to June 1, 1930.

Further answering, these defendants deny that the so-called earned premium theory as set up in plaintiff's bill of complaint is a proper method of determining under- [fol. 822] writing profits, and that the so-called written premium theory as set up in plaintiff's bill of complaint is a proper method of determining underwriting profits. Defendants further deny that either of said theories, to-wit, the so-called written premium theory and the earned premium theory, are proper theories for determining whether the plaintiff has in its insurance business in the State of Missouri made a reasonable profit, as defined and set forth in the statutes of the State of Missouri governing the writing of insurance by stock fire insurance companies. Further answering, defendants allege and state that this plaintiff is entitled to a reasonable profit as represented and exemplified by dividends paid to stockholders on the

basis of its issued and outstanding stock, and is not entitled to any other kind of profit or any profit in addition to a reasonable profit.

Defendants deny that there is any such distinction as a banking business and an insurance business as applied to stock fire insurance companies, and state that such stock fire insurance companies and this plaintiff in particular may not engage, according to the terms of its or their charters of incorporation, in any other kind of business than the business of insuring property against the hazard of loss by fire (lightning), windstorm, and allied lines of insurance, and that neither this plaintiff nor any of the other such stock fire insurance companies are in [fol. 823] anywise permitted or authorized to engage in any other kind of business, as such, except so far as it may be necessary or desirable to keep the funds arising from its authorized business invested in proper securities, and the earnings from such investments are properly to be considered in the income column of this plaintiff as an offset to the outgo as represented by losses and expenses.

Further answering these defendants say that this plaintiff has not at all times and does not now operate its business in a frugal and economical manner, but on the other hand these defendants state that this plaintiff has for many years last past and does now pay excessive and exorbitant commissions for the procuring of insurance, and excessive and exorbitant salaries and overhead charges generally in the handling of the insurance business so procured, and further that said plaintiff has been at all times conducting its business in respect to the incurring and payment of losses and expenses in a profligate manner, induced thereto by virtue of the fact that it claims and has claimed at all times that it may tax the cost thereof and the amounts so expended onto its outgo as a basis for demanding an increase in its rates on premium charges on different classes of insurance, in order that it may show, as it claims, an income in excess of its outgo which it claims to be not in excess of a reasonable income or profit, and defendants state that this plaintiff in its alleged experience on fire (lightning) and windstorm insurance in [fol. 824] the State of Missouri for the years 1924 to 1928, both inclusive, has shown such exorbitant and profligate expenditures in its expense and loss ratios, and has failed to show in such alleged experience all of its income during such period which it is necessary and

proper that it show in order to determine if in fact it has been making during such period of time as aforesaid a reasonable profit permitted to it under proper construction and application of the statutes of the State of Missouri regulating and governing the conduct of the business of insurance by this plaintiff in the State of Missouri, and defendants say that such showing so made by this plaintiff in its bill in equity and its amendment to its bill in equity has been knowingly made for the express purpose of incuding, contrary to fact, this Court to believe that it has in fact been losing money on the business of insurance on the classes aforesaid so written by it in the State of Missouri during the period 1924 to 1928, both inclusive, and defendants therefore state and allege that the figures so shown by the plaintiff in its bill of complaint which constitute its alleged experience for the period of time aforesaid, are wholly inaccurate, incomplete and worthless for the purpose of determining its actual experience on such classes of insurance in the State of Missouri written by it during the period 1924 to 1928, both inclusive.

Further answering, defendants state that a proper showing of the experience of this plaintiff on its writings [fol. 825] of insurance in the classes of fire (lightning) and windstorm risks in the State of Missouri during the period 1924 to 1928, both inclusive, will show, and these defendants therefore allege the fact to be that this plaintiff has, during all of the time mentioned in its bill of complaint and in its amendment to said bill of complaint, and for many years prior thereto, made greatly in excess of a reasonable profit on such business actually and under any proper construction of the statutes of the State of Missouri governing and regulating the conduct of the business of insurance in the State of Missouri by this plaintiff.

Wherefore, these defendants pray that the prayer of this plaintiff as set forth on pages 42, 43, 44, 45 and 46 of its bill in equity, be in all things denied, and that the prayer of this plaintiff as set forth on pages 14 and 15 of the amendment to its bill in equity filed herein be in all things denied, and that the interlocutory injunction heretofore granted on July 2, 1930, be set aside and for naught held, and that the costs of this action be awarded against the plaintiff herein, and that the expenses that these defendants have been put to, including traveling

expenses, advancements for court costs and attorneys' fees, both paid and incurred, be fixed and determined, and also such expenses and fees be awarded to these defendants and against this plaintiff, and that the same be taxed as costs in this action, and that execution be had therefor, and defendants pray for such other and [fol. 826] further relief as may to the Court seem just and proper.

Stratton Shartel,
Attorney General,
Glen C. Weatherby,
Assistant Attorney General,
Henry Depping,
Assistant Attorney General,
Ira H. Lohman,
Special Counsel,
Justin D. Bowersock,
Special Counsel.

Bowersock, Fizzell & Rhodes,
John F. Rhodes,
Of Counsel.

State of Missouri, County of Jackson -- ss.

John F. Rhodes, being duly sworn, upon his oath says that he is attorney and agent in this behalf of the defendants, and that the above answer to the bill of complaint and amendment is true, as he verily believes.

John F. Rhodes.

Subscribed and sworn to before me this 14th day of July, 1930.

Katherine Webber,
Notary Public.

(Seal)

My Commission expires June 3, 1933.

Exhibit 1.

The following named insurance companies signed said stipulation and are now parties in some of the suits numbered 270 to 426, both inclusive.

Yorkshire Insurance Company
Rhode Island Insurance Company
Automobile Insurance Company
Globe & Rutgers Fire Insurance Company
[fol. 827] Orient Insurance Company
Connecticut Fire Insurance Company
Tokio Marine and Fire Insurance Company
Great American Insurance Company
Alliance Insurance Company
Norwich Union Fire Insurance Society
The Home Insurance Company
Fire Association of Philadelphia
Merchants Fire Assurance Corporation of New York
Firemen's Insurance Company
County Fire Insurance Company of Philadelphia
Federal Insurance Company
American Alliance Insurance Company
Dubuque Fire & Marine Insurance Company
American Central Insurance Company
Commonwealth Insurance Company of New York
Agricultural Insurance Company
National Fire Insurance Company of Hartford
The State Assurance Company, Ltd.
Westchester Fire Insurance Company
Atlas Assurance Company, Ltd.
Union Assurance Society, Ltd.
Aetna Insurance Company
Fireman's Fund Insurance Company
Western Assurance Company
Employers' Fire Insurance Company
The Mercantile Insurance Company of America
Caledonian Insurance Company
Hartford Fire Insurance Company
Pacific Fire Insurance Company
North River Insurance Company Camden
Camden Fire Insurance Association
Glens Falls Insurance Company
Queen Insurance Company of America

Michigan Fire & Marine Ins. Co.
Palatine Ins. Company, Ltd.
National Ben Franklin Fire Insurance Co.
Scottish Union & National Ins. Co.
Century Ins. Company, Ltd.
New Jersey Ins. Co.
The [Pheonix] Ins. Co., Central States Fire Ins. Co. and Equitable Fire & Marine Insurance Company
Fidelity-Phenix Fire Insurance Company
Old Colony Insurance Company
Continental Insuranee Company
London & Lancashire Ins. Co., Ltd.
Springfield Fire & Marine Insurance Company
Girard Fire & Marine Insurance Company
The Northern Assurance Company, Ltd.
[fol. 828] Franklin Fire Insurance Company of Philadelphia
The Hanover Fire Insurance Company
St. Paul Fire & Marine Insurance Company
Stuyvesant Insurance Company
California Insurance Company
Sun Insurance Office, Ltd.
British American Assurance Company
Mechanics Insurance Company of Philadelphia
Citizens Insurance Company of Missouri
United States Fire Insurance Company
Boston Insurance Company
Union Fire Insurance Company
Insurance Company of the State of Pennsylvania
The Law Union & Rock Insurance Company
Granite State Fire Insurance Company
Royal Insurance Company, Ltd.
Pheonix Assurance Company
British General Insurance Company, Ltd.
New Hampshire Fire Insurance Company
Importers & Exporters Insurance Company
Insurance Company of North America
Northern Insurance Company
Victory Insurance Company
Urbaine Fire Insurance Company
American Eagle Fire Insurance Company
National Union Fire Insurance Company
Eagle Star & British Dominions Insurance Company
National Liberty Insurance Company of America
Liverpool & London & Globe Insurance Company, Ltd.

Providence-Washington Insurance Company
Star Insurance Company of America
The Newark Fire Insurance Company
Massachusetts Fire & Marine Insurance Company
Concordia Fire Insurance Company of Milwaukee
City of New York Insurance Company
The London Assurance Corporation
Pennsylvania Fire Insurance Company
Bankers & Shippers Insurance Company
Milwaukee Mechanics Insurance Company
Royal Exchange Assurance
North British & Mercantile Insurance Company, Ltd.
Northwestern National Insurance Company of Milwaukee
United Firemen's Insurance Company of Philadelphia
United States Merchants & Shippers Insurance Company
Commercial Union Fire Insurance Company
Home Fire & Marine Insurance Company
American Insurance Company
Buffalo Insurance Company
Minneapolis Fire & Marine Insurance Company
Security Insurance Company of New Haven
[fol. 829] Detroit Fire & Marine Insurance Company
Standard Fire Insurance Company
Safeguard Insurance Company
Niagara Fire Insurance Company
Mechanics & Traders Insurance Company
Svea Fire & Life Insurance Company, Ltd.
Hudson Insurance Company
Commercial Union Assurance Company, Ltd.
Reliance Insurance Company of Philadelphia
Columbia Insurance Company
Standard Fire Insurance Company of New Jersey
Imperial Assurance Company
(115)

Exhibit II.

The following named companies did not sign said stipulation, but were among the parties plaintiff in the prior Federal Court litigation, and are parties plaintiff in some of the suits numbered 270 to 426, inclusive:

Harmonia Fire Insurance Company
Independence Fire Insurance Company

Delaware Insurance Company
National Reserve Insurance Company
Northwestern Fire and Marine Insurance Company
Merchants Fire Insurance Company
The Eagle Fire Company of New York
Western Fire Insurance Company
The World Fire & Marine Insurance Company
Patriotic Insurance Comp. y of America
First American Fire Insurance Company
American Equitable Assurance Company
National Security Fire Insurance Company
The Travelers Fire Insurance Company
Potomac Insurance Company of the District of Columbia
The Carolina Insurance Company
Sentinel Fire Insurance Company
Merchants Insurance Company
East and West Insurance Company
Transcontinental Insurance Company
Federal Union Insurance Company
New York Fire Insurance Company
Philadelphia Fire & Marine Insurance Company
[fol. 830] Chicago Fire & Marine Insurance Company
Mercury Insurance Company
Columbia Fire Insurance Company
Lumbermen's Insurance Company
The Preferred Risk Fire Insurance Company
Guaranty Fire Insurance Company of Providence
Columbian National Fire Insurance Company
Twin City Fire Insurance Company
London and [Privincial] Marine and General Insurance Co., Ltd.
Presidential Fire & Marine Insurance Company
General Insurance Company of America
Eureka-Security Fire & Marine Insurance Company
Superior Fire Insurance Company
New York Underwriters Insurance Company
Commerce Insurance Company
Provident Fire Insurance Company
Iroquois Fire Insurance Company"